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FOREWORD

COORDINATE MEDIATION AND ARBITRATION IN LABOR RELATIONS

IN THIS hour, when there is a rising tide of labor disputes and industrial peace hangs in the balance, there seems to be the greatest confusion as to the power of mediation and arbitration to control this menace to defense production. There are the advocates of mediation who believe arbitration has no place in labor disputes and there are the advocates of arbitration who see the futility of mediation. The great mass of people do not know the difference between the two processes and the scope and limitations of either of them. Let us, therefore, come to a clear understanding of the merits of the two processes, with a view to a better organization of our industrial peace machinery.

Arbitration is a judicial process; the arbitrator sits as a private judge and is called upon to determine the legal rights and economic interests of the parties, according to the records and proofs presented by the parties themselves. The arbitrator is bound to make his decision according to his records and proofs and to the arguments presented. In return for his faithful observance of this duty, arbitration laws permit his decision to be entered and enforced as a judgment of the court without its reviewing his decision. His task is, therefore, the same as that of a Federal or state judge called upon to decide a case between litigants.

The right of parties to submit voluntarily their issue to a private judge, chosen by themselves, is guaranteed by arbitration law and a written, signed agreement, either in the form of a submission or arbitration provision in a labor contract, is required before an arbitration can be held. The law itself brings to an arbitration the aid of the court in requiring observance of both the agreement and the award. These laws require a hearing, unless the parties, in writing, waive it, and that all pertinent and material evidence be heard, and they require absolute impartiality in the arbitrators. Failure to observe these fundamental guarantees empowers the court to set aside an award on these grounds. Furthermore, in making their agreement to

arbitrate, parties agree to accept the decision as final and to abide by it. They may even post a bond for faithful performance.

There is positively no place in an arbitration proceeding for compromise or bargaining. The moment an arbitrator undertakes such a duty, he is disqualified as an arbitrator. Therefore, he can take judicial notice only of what is presented in the record and he must clearly and justly decide the issue. Hence, it is important that the parties prepare their case with the utmost care and present it concisely. Indispensable to such a determination is an orderly proceeding. Therefore, there must be rules of procedure that fulfill the requirements of the arbitration law and the administration of justice.

The function of a mediator is wholly different. When there is a threatened strike or lockout, he must be prepared to make reasonable suggestions which will result in a compromise. He must meet with partisans and enter into a bargaining arrangement. He must undertake to get the best terms possible, consistent with maintaining peace. He must patiently hear both sides, not necessarily in an orderly proceeding and not on the basis of evidence, but in the human terms of bargaining. Rules of procedure, so necessary in arbitration, would be a handicap. The mediator is not clothed with authority to make a binding decision, but may only make a recommendation which either party may reject or accept, and may follow as long as he sees fit. The job of the mediator is to reconcile the minds and demands of the parties so they will resume or continue to work together and settle their own grievances.

There is another fundamental difference. Arbitration functions under a free system of enterprise; it has for centuries been born and bred in it. It is a method of self-regulation. It is a civilian activity in the sense that it is wholly voluntary, depends upon the will of the parties, and any effort of government compulsion or coercion would, therefore, utterly destroy its efficacy. To compel parties to accept arbitration would be to deprive them of their free right of trial at law, and of their voluntary right to waive such a trial. Arbitration does not, therefore, lend itself to government intervention or legislative compulsion, and any encroachment is to be resisted if arbitration is to retain the integrity of self-regulation.

There is another reason. Arbitration is based upon contract and is in itself a contract. Says the law: to submit a matter to

arbitration, there must be an actual controversy that could have been made the subject of an action at law. Says the law: unless there is an arbitration agreement, made in writing and voluntarily signed by the parties, the court cannot recognize the agreement or award as legally binding. Any form of compulsory arbitration, therefore, violates the right of free contract and of its judicial interpretation and application.

Mediation, on the contrary, is a process which government can control or in which it may participate. It may, for example, require that during a period of specified time a strike shall be delayed and mediation tried. It may, and has, established official boards to mediate disputes. Such a proceeding violates no fundamental rights of contract, no fundamental guarantees of self-regulation under arbitration laws, no traditions established by countless court decisions over the centuries. For in mediation the decision is not binding.

If, then, these two processes are so fundamentally different, wherein lies the schism and failure of each in the present emergency? It is in the confusion of our thinking and in the attempt of official mediators to assume the functions and powers of arbitrators. It is, for example, an infringement of the field of arbitration for government representatives to acquire the power to name arbitrators under labor agreements, for they usually fail to provide any of the safeguards or appurtenances of arbitration and retain, therefore, only the characteristics of a glorified mediation. To provide for arbitration in labor contracts and leave the arbitrator with no rules of procedure or administrative facilities or method of insuring impartiality, is to doom arbitration in the beginning and destroy faith in its efficacy.

To undertake to use the judicial process of arbitration in settling a strike and in subsequently arranging the terms of a labor agreement, is equally a mistake, for what is here needed is a meeting of the minds of the parties, either to submit to arbitration an existing dispute to be defined in a submission, or to write an arbitration provision in the contract. Applied in this way, government, by sending conciliators to scenes of conflict or in appointing mediators, may perform a legitimate and useful function and greatly advance industrial peace and defense production.

Applied to the present situation, mediation is a pre-labor-contract process. When there is no contract or when one is in the

course of negotiation or revision, mediation is the best process and may be made compulsory without destroying any fundamental rights, if the *process only* is compulsory.

But once the contract to arbitrate is made, whether in a submission or labor agreement, then mediation has no place in the interpretation or application of a labor agreement and government intervention in determining that process or in appointing arbitrators cannot but lead to a curtailment of individual right and reach closely to the border of coercion.

It is alleged on behalf of mediation that neither management nor labor will bind itself in advance to accept and abide by an arbitration award. The records of the American Arbitration Association refute this allegation, for in everyone of the hundreds of cases submitted to its Voluntary Industrial Arbitration Tribunal, such a commitment has been made and the award accepted by all of the parties. Many labor agreements that provide for the initial process of mediation and the eventual one of arbitration make such commitments and the trend is definitely in that direction.

A more real obstacle is the attempt to carry over into arbitration the old principle of mediation, whereunder each party appoints a partisan and the two select a neutral. Then the arbitrator has two mediators, if not advocates, as his associates. In an arbitration, the courts discourage this practice and will annul awards where such partisanship is shown. It is again a matter for careful delimitation of the processes of mediation and arbitration and in education in their use, and of provisions in rules of procedure that permit of the challenge of partisan arbitrators. Not at once can this change be made, but the greater security that justice affords over compromise is an important factor in the progress toward complete impartiality in arbitrators.

To bring arbitration within the orbit of government domination would mean the disruption of every fundamental principle that is today a measure of its service. These include the right of the parties to name the arbitrators and to determine their exact powers, to make rules of procedure, to conduct their own proceedings and to avail themselves of the benefits of arbitration law. Arbitration is a civilian self-regulative procedure maintained by management and labor. It is not adaptable (as is mediation) to a transfer from an economic environment to integration in the political system.

Should any Federal or state law, therefore, make arbitration (not mediation) compulsory, it would cease to be a measure of self-regulation in a system of free enterprise, its voluntary contractual relation would be destroyed, and in turn it would wither and die. Should government undertake to impose arbitration under labor contracts or to dictate the appointment of arbitrators or their procedure, parties would lose the valuable rights of self-determination and free choice, now guaranteed under most arbitration laws. Should rules of procedure be imposed by compulsory process, there would immediately be lost the ancient right of parties to determine their own procedure and its flexibility would be greatly stiffened.

It must, therefore, be clear that mediation and arbitration have different functions to perform in this crisis. One makes peace; the other keeps it. One leads to the making of labor agreements; the other compels their observance. One is corrective of existing situations, while the other is preventive of future disputes by removing the very source of the evil that causes them. One seeks to rectify inequalities; the other maintains equalities thus established.

Let us, then, join the issue and make a fair division of the field in this crisis, allotting to each the task it can do best. Let us admit that mediation, strengthened by government interest, is the best method of quelling disputes that have gotten out of hand, where there are no labor agreements; that it is the best method of negotiating or making such an agreement and that it is a desirable pre-arbitration device in a labor contract to compose differences prior to their submission to arbitration. And let us organize mediation on a compulsory basis as to *process.*

Let us admit, equally frankly, that voluntary arbitration, backed by the good faith of the parties and by arbitration law, is the best and only method of requiring men to live up to the terms of a contract; that it is the best and fairest method of interpreting and applying that contract; and that it is the best way of permanently stabilizing labor relations. And let us organize arbitration on the basis of free determination.

There is room for both—mediation may well become the official channel of action, while arbitration remains the civilian voluntary system. But only by a clear delimitation of functions and powers and by unity of effort will American defense be attained. This is the position taken by the American Arbitration

Association, which heads the civilian line, for in no instance will it undertake mediations.

Let us, then, in the face of the menace of disputes threatening American defense production, use both processes where they best fit. Let us not disparage one procedure to the disadvantage or discredit of the other. Let us not throw away one single item or instrument for the preservation of peace and goodwill during this crisis. Let us, on the contrary, seek to develop each to its '*n*th power and adapt it to achieving industrial peace.

Therefore, let us cease to confuse mediation with arbitration, for only here can clear thinking begin. Let us use arbitration clearly to interpret and apply labor agreements; let us use arbitration law and the courts to give permanence to decisions by legal enforcement of agreements and awards. Let us frankly concede that mediation is more effective without formalism or rules, but that the integrity of arbitration would fail without them; let us forego an administered proceeding for mediation but cling with tenacity to it for arbitration. Let us not forget the difference between a conference table and a hearing, between a conversation and evidence, between a tribunal and an informal meeting, and between a recommendation and a decision.

If mediators and arbitrators, with respect for each other, will go forward together, each to his separate task with his own technique, and pool their experience in the general cause of industrial peace, we shall do away with confusion upon which, in its multiple forms, labor disorders thrive. We shall then build confidence in both procedures and faith in both mediators and arbitrators. In the present world conflict, no other course lies before us if we would drive disputes out of American industries in a manner befitting the Democracy in which we live.

FRANCES KELLOR

MARCH OF EVENTS

Arbitration as a National Asset

One of industry's great problems is how to expand arbitration to the utmost in our inner defense lines, so as to preserve the American system of free enterprise and the right of self-regulation through voluntary effort. In a democracy like ours, arbitration is one of the fundamental freedoms, namely, the right of individuals voluntarily to compose their differences and settle their own disputes in their own way, insofar as it is possible for them to do so. In the present war emergency, not only may the system of free enterprise and the right of self-regulation fail, but the instruments themselves may become dulled or deteriorate. It is, therefore, the task of the American Arbitration Association, insofar as arbitration can serve, to maintain these traditions and instrumentalities for peace and goodwill and unity.

Time is of the essence, and we must use the stock of goodwill and arbitration technique on hand with the utmost expedition. Old processes must give way to more direct action and higher concentration in war industries. Arbitration must be "piped" into every defense industry with the greatest possible speed and under the highest pressure, so no industry may be without arbitration facilities and services and in order that no excuse can be offered for delays through disputes.

Up to the present time, the defense work of the American Arbitration Association has been at long range, all proceeding and directed from the New York headquarters. Now, in thirty of the leading cities in the United States, in addition to New York City, arbitration centers, or "depots," for both commercial and industrial arbitrations have been established, under a plan to make the Tribunals of the Motion Picture Arbitration System available for the arbitration of disputes,* whether they arise in defense or non-defense industries. This plan has had the generous approval of the Motion Picture Producers, who maintain the System, and of the Department of Justice, which collaborated in its establishment. It will be administered by the

* See announcement on p. 304.

American Arbitration Association, which set up and administers the Motion Picture System.

As a result of this action, every one of these thirty key cities becomes a supply station through which arbitration will be "piped" to American industry and a link in a vast chain of "Arbitration for National Defense."

Michigan Modernizes Its Arbitration Law

On January 8, 1942, Michigan joins the other great industrial states * that have modernized their arbitration laws by writing into them a provision making arbitration agreements in commercial contracts, whether for existing or future disputes, legally binding and enforceable. In connection with that event, the American Arbitration Association will open a Michigan Arbitration Tribunal and will appoint a Michigan Arbitration Council to collaborate in the educational work of putting the new provision into effect and in bringing within reach of the vast defense projects of the State immediately available arbitration machinery.

Arbitration In Action

Arbitration has a new guidebook. Projected for years, the need for it became imperative in recent months. Realizing that this is no time to make mistakes in arbitration, and that there is not time to follow the slow trail of trial and error in arbitration proceedings, the Executive Vice President of the American Arbitration Association, Frances Kellor, has written *Arbitration in Action*, just published by Harper & Brothers, from the record of some 25,000 commercial, industrial and civil arbitrations that have been brought to a satisfactory conclusion in the Association's Tribunals.

The aim of *Arbitration in Action* is to offer a short cut to information on how, when and where to arbitrate, the technique of arbitration and how it can best be used to advantage. It undertakes to set forth principles and standards of law and practice and a way of proceeding under them, so those actively engaged in industry and commerce need not take the time to hunt for the information or go blundering along looking for the answer. It is

* They are: New York, New Jersey, Massachusetts, Oregon, California, Louisiana, Pennsylvania, Arizona, Connecticut, New Hampshire, Rhode Island, Ohio, Wisconsin.

a description of voluntary arbitration, as applied in a process of self-regulation, and offers a way of avoiding compulsory features of arbitration which are in reality its final destruction.

Vistas of the Future

The *Journal of the Institute of Arbitrators* (London), in announcing future plans, states that they must be in accordance with "the circumstances prevailing." Any nation which can so refer to the ordeal through which Great Britain is passing, is not going to see arbitration die. With characteristic foresight, which furnishes an excellent example to the United States, the Institute is even now laying plans to make arbitration greater in the future than it has ever been in the past.

Speaking at a March meeting, Lord Askwith, its president, had this to say about the future of the Institute:

> "The world will have to take more note of arbitration in days to come. This Institute, together with other bodies, if possible, might well at the end of the war send out a delegation consisting of one of our Secretaries, together with a legal member who can argue with the Americans. We could call it a Commission of Enquiry. This would bind ourselves still more with the American citizen, and we could then see whether we could make a further advance. I think we all believe that this is of great importance in the world at large. There are nations at the present moment who talk of arbitration, but they combine threats that may mature unless their suggestions are accepted. This is not what we want. We are out now against a world of force, trying to arrive at just decisions.
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> "We shall have, willy nilly, to be more and more united with the great nation on the other side of the sea, and we shall have to throw away some of our apparently conflicting views and particularly petty squabbles in order to take a broad view of this principle. Now anything that the Institute of Arbitrators can do on those lines, small or large, would establish the Institute as a vital force which may be of great value.
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> "I have tried to put before you the value of retaining this Institute, and retaining it to the utmost of your power, and of the Institute taking a wide view, for in the future there may be vistas of possibility of action which are at present dimmed to our eyes."

A Pioneer Reports

In any chronicle of arbitration, Actors' Equity Association will be included as one of the first groups to march under arbitration's banner. In prosperous and lean years in the theatre it has never faltered in its belief in the principle and practice of arbitration. Recently, for the sixteenth consecutive year, a report on the

year's arbitrations was made to members. The following excerpt indicates the Association's continuing enthusiasm for this method of settling its differences:

> "Not so many years ago, Equity was a lone pioneer in the field of arbitration. Now not only have all the unions in the entertainment field adopted arbitration as a regular means of settling disputes, but this year the motion picture industry has adopted it as a means for the settlement of disputes between producers and exhibitors and the American Arbitration Association is the chosen tribunal under whose auspices the arbitrations are taking place. We congratulate American Arbitration Association in thus extending its sphere of influence and we hope that the motion picture industry will be as happy in taking this step as we have been since we adopted arbitration. If only a way could be found to organize, develop and use arbitration as a regular means of settling national and international disputes, we might have a better world to live in all around."

Arbitration Tames the Snake River Valley

From R. E. Shepard, of Jerome, Idaho, comes news of an arbitration board set up in 1919 to settle disputes over water, as precious as money in the arid lands of Idaho.

For twenty-two years Mr. Shepard served on a standing board of arbitration to settle disputes over distribution of water from the Snake River to the desert plains. This river, winding out to the plains from some of the wildest, least explored territory of our country, is a source of supply to a section covering over a million acres of land and involving some hundred man-built canals. At first lawsuit followed lawsuit in quarrels over such matters as usage and rights of way. Litigations regarded progress in the valley, and four or five murders a year, growing out of water disputes, were not uncommon.

Then in 1919 a few farsighted men concerned about the welfare of the section formed a board of arbitration. This board they called the Committee of Nine, as the whole Snake River Valley was divided into sub-districts numbering nine. The Committee, acting as a sort of fire department, never had any legal authority whatever, but was composed of unselfish men who understood the problems of the country and found its recommendations generally accepted by the people. Since 1919 not a single lawsuit or extra-legal settlement by way of murder grew out of the distribution of water. Arbitration—voluntary, just and democratic—solved an important problem.

"Exhibit A"

The circumstances under which Arbitration found itself one of the features of the Civilian and National Defense Exhibit, which opened at the Grand Central Palace on September 20th, were the logical developments of the way in which arbitration has "enlisted for the duration" to do its part in speeding up defense production and clearing trade channels of disputes that might delay the delivery of army and navy supplies and equipment.

No longer content to sit by its commercial fireside arbitration is marching out to commercial, industrial and other fields of national defense activity to play a leading rôle in national and inter-American arenas of United States and Western Hemisphere defense efforts.

Arbitration in an Internment Camp

In the summer a request received by the Association from Port-of-Spain, Trinidad, for rules of procedure and arbitration forms revealed that the internees in the Aliens Internment Camp there have set up an arbitration tribunal to deal with disputes arising among themselves. While the arbitration machinery operates without the legal attributes of enforceable arbitration agreements and awards, it provides the internees a method if dispensing justice among themselves. At the same time it demonstrates how readily arbitration adapts itself to any circumstances and helps give men a sense of freedom and self-regulation, even when confined behind the barriers erected by the exigencies of war.

GOOD NEIGHBORS MAKE GOOD PARTNERS

COORDINATED ECONOMIC ACTION IN THE AMERICAS

CHARLES HENRY LEE *

A DISMAL situation faced the American Republics as the economic consequences of the world conflict began to strike home. Europe had always been a large consumer of the raw materials of the other American Republics and an important supplier of manufactured goods and machinery. Now, suddenly, all contact with Continental Europe was cut off and these markets eliminated as a source of international trade.

The economic repercussions were, naturally, enormous. When the War broke out, the other American Republics were producing around five billion dollars worth of goods annually. About one-third of this total was being exported. Continental Europe was taking about one out of every ten or eleven dollars worth of goods produced, or some five hundred to six hundred million dollars. Germany alone took $190,000,000 in 1938. The loss of these markets hit these countries severely. It meant the loss of nearly two-fifths of their foreign trade.

Warehouses were bulging with unexportable surpluses. Exchange difficulties, still not completely solved in most countries since the world crisis of the early thirties, became critical, thereby rendering it practically impossible for them to purchase the manufactured goods and machinery vital to their national existence. And, finally, they were completely cut off from normal European sources of supply. The threat of economic and political upheavals was acute.

It was obvious that prompt and effective measures were required to avert the more drastic consequences flowing from the world cataclysm and to render the other American Republics less vulnerable in the future to totalitarian economic and political penetration. Moreover, our task was apparent if the other Americas were not to believe that we gave only lip service to the Good Neighbor Policy. The adoption of adequate and prac-

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tical measures to counteract the economic repercussions produced by the War and bulwark the Western Hemisphere against the commercial and cultural imperialism of the totalitarian powers became an immediate concern of the United States, and the cultural and economic defense of the Western Hemisphere a guiding principle of our foreign policy.

To integrate the activities of Government agencies, as well as those of private business, organizations, and individuals in this field, there was created by the Council of National Defense, with the approval of the President, on August 16, 1940, the Office of the Coordinator of Commercial and Cultural Relations between the American Republics, since changed to the Office of the Coordinator of Inter-American Affairs. Its activities are divided into two phases: Commercial and Cultural.

The latter are designed to strengthen mutual understanding, appreciation and sympathy between our countries. In the field of communications, such as motion pictures, radio and news, definite steps are being taken to improve the substance and increase the volume of the subject matter which is being sent to our southern neighbors, as well as that which is coming from them to this country. Constructive measures are being carried out in cooperation with the leading educators and institutions in the Americas, such as the development of textbooks and curricula material for schools, and the provision in colleges and universities of more adequate instruction in the language, history, jurisprudence, art, economic and social background of the other American Republics. Projects aiming at a diffusion of a wider appreciation of the art of the Americas between the peoples of the continent are under way. Exhibitions of fine, industrial and graphic arts, as well as interchanges of artists, musicians and concerts, are being promoted. The Office is fostering the translation into English, Spanish and Portuguese, of the best literature, both past and present, of the various Republics. The translation of popular publications is likewise being promoted. Many other projects are either under way or will shortly become a reality in the cultural field.

To offset the economic dislocation caused by the world conflict and at the same time strengthen the structure of the national economy of the other American Republics, so that they may become less vulnerable to world changes, the Government has taken many positive steps. Closely allied with the efforts of

several of its departments and agencies operating in the inter-American field are the endeavors of the Coordinator's Office to correlate and integrate our Government's commercial activities. The purpose is to achieve the utmose efficiency and the maximum possible results.

The Congress of the United States in September of last year made available a revolving fund of $500,000,000 as an aid to the other American countries. The benefits of these monies are being felt by them through the media of loans extended by the Export-Import Bank, designed not only to tide them over their exchange difficulties caused by the present conflict, but also to develop new sources of production. These loans have served to stabilize the economy of these countries and to contribute to the orderly marketing of their raw materials. The Treasury Department, too, has been active, making available part of its stabilization fund to certain American Republics. This gave our neighbors a breathing spell to enable them to decide how best to gear their production to hemisphere markets.

To assist further in meeting the primary problem of maintaining the purchasing power of the other American countries so that they could continue to import their minimum requirements for a healthy level of economic activity, the purchase by the United States of more goods from them has been encouraged. It was realized that this was the largest measure of assistance that could be rendered to enable them to replace their lost markets. Our buying from Central and South America has increased steadily as purchases have been diverted to the Southern Republics. Our businessmen have vigorously explored potential sources of complementary commodities that can be marketed in the United States. Special attention has been given to the importation of critical and strategic materials needed in our National Defense Program. From Chile we have been buying large stocks of copper and nitrate, from Bolivia we have bought tin, and from Brazil industrial diamonds. That these efforts are already producing results can be judged from the fact that in 1940 we bought $170,000,000 more from Central and South America than we did in 1938, and during the first five months of 1941 our purchases nearly equaled the total 1938 purchases. Our imports are now running at the rate of over one billion dollars a year.

These steps are not entirely short-term in nature, for they

include such constructive measures as the credit and technical assistance recently extended to Brazil to enable that country to set up a modern steel mill which will tend to make it independent of imports of this material. This example is typical of the constructive aid being extended, the healthy consequences of which should run far into the future.

Another instance of a practical and extremely useful form of good neighborliness is the experts and technicians that the United States has been placing at the disposal of the Governments of the other American Republics for advice, consultation and cooperation. The story of the efforts of fifteen American Governments to bring back the rubber industry to this hemisphere, in conjunction with the United States Department of Agriculture, makes fascinating reading. The Department this year has set up a number of large rubber nurseries and plant breeding stations at strategic points throughout the hemisphere. In addition, seeds and "clones" are being supplied to the cooperating groups in these countries. Moreover, the Export-Import Bank has made a loan to Haiti for development of a rubber industry in that Republic. According to certain experts, these efforts may make the Western Hemisphere self-sufficient in this field.

The foregoing by no means covers the total area of Governmental action in this regard, and many departments and agencies, such as the State Department and the Department of Commerce, have always had a vital and continuing interest in the inter-American picture, which increased general activity has merely served to intensify.

The international machinery that is working in the field of increased inter-American commercial intercourse is especially significant. Analyzing it in its broader aspects, perhaps the mainspring has been the results of The Inter-American Financial and Economic Advisory Committee which was set up by the meeting of Ministers of Foreign Affairs of the American Republics, held in Panama in the fall of 1939. With a representative from each one of the Western Hemisphere Republics this organism has been functioning in Washington, studying the many common problems of this continent, and then recommending appropriate remedial solutions. Of particular interest is the Inter-American Development Commission which this Committee created on January 15, 1940, whose chairman is the Coordinator of Inter-American Affairs, Mr. Nelson A. Rockefeller. Its purpose is to promote

the formation and financing, with both United States and other American capital, of such enterprises as will undertake the development of new lines of American production for which a new or complementary market can be found in the United States or other Republics of the Western Hemisphere. The scope is broad and includes the development not only of mineral resources, agricultural and forest products, but new industrial possibilities as well. Much spade work has already been done gathering and compiling the necessary basic information. To implement this work national councils, designed to provide adequate machinery for the central Commission, have been set up already in ten South American countries, while the establishment of councils in the other eleven countries will be completed shortly.

In turn, the Development Commission has set up the Merchandising Advisory Service which was established about a year ago. This Service is rendering practical aid to manufacturers and exporters of the other American Republics in the development of products, non-competitive with domestic manufactures in the United States, which will meet with ready consumer acceptance in this country.

Another fine example of constructive action, cooperative in nature and of an international character, was the Inter-American Coffee Agreement to regulate marketing and stabilize prices. In the case of the great staple crops, coffee, corn, wheat, cotton, cacao, and sugar, the trade disruptions created by the world conflict seriously aggravated marketing problems which were difficult even in normal times. Coffee was one of the most baffling problems, yet representatives of the American Republics, working in intelligent collaboration, submerged extreme national demands to secure a common agreement in the interest of all. The critical problem this was can easily be realized if one remembers that the total coffee exports of the other American Republics are about a quarter billion dollars out of total exports of well under two billion. Moreover, two-fifths of these exports normally west to Europe. This country, as the chief consumer, and without any interest as a fellow-producer, worked unselfishly with the fourteen coffee-producing Republics to bring about this highly important result, which marks a milestone that should serve to stimulate further cooperation in the solution of inter-American commodity problems.

The idea of an Inter-American Bank has long been under dis-

cussion at Pan American conferences. Consequently, when the Inter-American Financial and Economic Advisory Committee proposed it after many months of study and effort over a year ago, in collaboration with Government banking experts, it was not as novel a proposal as was generally believed. This project, ratification of which is now before Congress, is designed to provide inter-American machinery to render financial assistance which private banking might feel is not properly within the sphere of its activities. As planned, it will be an inter-Governmental organization, set up under a Federal charter granted by the United States. Participation by the United States under the schedule of minimum subscriptions will require a subscription of 50 shares in an amount of five million dollars. It is not intended to compete with or encroach upon adequate existing banking facilities, and will work along with the Export-Import Bank in this country. Already nine Republics have expressed their adherence to this project. The general acceptance of the Inter-American Bank should prove useful in providing a common meeting ground where the financial minds of the American Republics can work out jointly problems affecting their national welfare.

Another aspect of our inter-American commercial relations is especially related to the United States Defense Program and its repercussions in the other American Republics. The diversion of all the import trade of the other Americas to the United States would not ordinarily prove a serious problem. Now, however, the defense effort raises the question of how to service them adequately and at the same time expand U. S. aid to the democracies to a maximum. The Priorities Board has recognized this problem, and the Coordinator of Inter-American Affairs has been appointed its special adviser on American priorities. In addition, a special Clearance Section has been set up in the Office of the Administrator of Export Control, designed to serve as a central point through which United States exporters and manufacturers, as well as foreign exporters, may submit proposals on articles and materials deemed essential. This will be of vital importance in clearing essential goods for the other American Republics. To facilitate its task the other agencies of the Government concerned with export control and licensing have designated liaison officers to represent them in this Office.

Closely allied with this is the shipping shortage which, likewise, stems from the Defense Program. The scarcity of ade-

quate shipping resources has tended to augment as British shipping losses have increased and as our armed forces have required more auxiliaries as well as more tonnage to carry material and personnel to our newly acquired bases. The Government, through its various agencies, with which the Coordinator's Office has been actively cooperating, is seeking to maintain sufficient tonnage in operation on inter-American shipping lanes to carry our purchases from Central and South America and to deliver their essential requirements, and utilize available ships in the most efficient way possible.

Another very serious problem which has been the constant concern of the Coordinator's Office, in conjunction with the Departments of State and Commerce, is the replacement by American firms of representatives who are identified directly or indirectly with anti-American activities in the other American Republics. The culmination of studies and investigations into this subject and efforts to correct this situation has been the publication July 17 last of The Proclaimed List of Certain Blocked Nationals.

Basically, the emergency measures have had as their objective the amelioration and cushioning of the immediate economic effects of the World conflict. On the other hand the long-range efforts have been designed to develop new sources of production in the Americas, both industrial and otherwise, thereby expanding their purchasing power and relieving their dependence on Europe.

As a whole, it is hoped that the many steps that have been and are being taken in this Hemisphere will serve as a solid foundation and guidepost within the framework of a new world economic order that is so earnestly desired and must perforce come with the reconstruction, once the present conflict is over.

Undoubtedly the other American Republics both require and desire a flow of capital to aid their development. The experience gained in the past, however, tends to call for caution on both sides in this regard. Joint action and, particularly, the enlistment of private local capital in the other American Republics are important points of the program. Private capital here too must become more generally confident to venture forth again to the other Americas under conditions that will avoid the pitfalls of the past. Many obstacles in the economic and financial field must be overcome.

This, naturally, brings up the problem of the defaulted dollar

bonds which have long served as a deterrent to smooth financial collaboration and retarded the healthy flow of capital southward. Many studies have been made and are being made to find a satisfactory formula to untangle this vexing problem. It is believed that a suitable solution will ultimately be found.

Many other problems which all go to complete the total picture should be considered, as should such constructive remedial measures as the Trade Agreements. However, they would only tend to emphasize the importance of the whole question and the need of meeting it squarely, both from the viewpoint of our national defense and the permanently sound relationships which we of the Americas desire to maintain and reinforce in this continent.

This hemisphere is still one of the great undeveloped regions of the world. Until the War recently disrupted the relations of the other American Republics with Europe, they were the customers and providers of all nations willing to trade. They accepted goods, immigrants and capital in exchange for foodstuffs, raw materials and mining output. It is unlikely that the old relations can be re-established on exactly the same footing or that the United States can take over the entire surplus output of products which were formerly sold to Europe. A radical change in their economic system is indicated and must be expected.

To open up their untapped resources and aid the other American Republics in industrializing, capital is required, and here the United States is in a position to exercise active leadership to provide the machinery and equipment necessary.

Good neighbors make good partners. The United States must be a staunch and unselfish partner in a joint venture for actualizing the Hemisphere's potential wealth for the common good. Our joint and coordinated efforts can then be a pedestal of strength in working out the Pan American ideal of sympathetic understanding and fraternal assistance, interdependently enriching the life of all.

ARBITRATION IN ACTION IN INTER-AMERICAN TRADE

THOMAS J. WATSON *

A SUCCESSFUL conquest of the Western Hemisphere has been carried on during the period of the past few years. It has not been accomplished by *blitzkrieg* methods or high-pressure penetration; it has not attacked defense lines, but has strengthened them. This conquest has been carried on entirely by friends within the Western Hemisphere, but it is one that is going to make any conquest by its enemies and ill-wishers increasingly difficult. It is the conquest by arbitration.

A narrative of this invasion of the Western Hemisphere by arbitration would be incomplete without a record of its extension among the twenty-one American republics. For over half a century the Americas have been building a system of inter-American peace through treaties, conventions and other agreements. These, however, were concerned primarily with political relations and did not immediately provide for the settlement of commercial disputes, and for many years this had been regarded as a defect in the inter-American system of pacific relations.

FOUNDATION OF THE COMMISSION

Hardly had the national arbitration system of the United States been successfully launched by the American Arbitration Association when its builders foresaw the necessity for extending an organized system of arbitration to inter-American trade relations. This task, however, was not so simple or direct as establishing the national system had been, for different nationalities, languages, customs and laws were involved. The Association proceeded in its usual methodical way, first to gather facts and then to plan a structure. By 1933 the data was in hand; by 1935 the system was established; and by 1937 it was possible to report that it was in working order.

This achievement was made possible only because, for nearly a half-century, statesmen in all of the republics had been engaged

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in building a basic foundation which is now being put to the test of maintaining unity in the Western Hemisphere. This basic foundation is the Pan American Union, and the many tributaries of goodwill and cooperation that flow into it from all of its member republics.

Political peace in the Americas has for many years been cemented by the Pan American Union and by the numerous treaties and conventions of amity, good-will, non-aggression or conciliation entered into by the various republics. Sometimes these were general conventions, or treaties in which all of the republics participated; at other times they were more limited in their application. But none of them paid very much attention to trade relations or to the preservation of commercial peace.

In 1931, however, commercial arbitration saw the first shot fired in its invasion of inter-American trade. In that year the Fourth Pan American Commercial Conference, meeting in Washington, adopted a resolution in which it requested the Pan American Union to have a thorough inquiry made as to the possibility of the commercial interests of the American Republics joining with the commercial interests of other countries in supporting and using a system of arbitration.

A survey of the laws and practice of arbitration in the American Republics by the Pan American Union, with the collaboration of the American Arbitration Association, followed, its findings providing the basis of a report made to the VIIth International Conference of American States meeting in Montevideo in December, 1933.

These findings showed that while each Republic had arbitration laws, there was no uniformity in their provisions or in the practice of arbitration. There was also an absence of any agreed upon standards; there were differences in provisions concerning the validity of agreements to arbitrate; there were few laws recognizing as valid agreements to arbitrate future disputes.

The report as finally prepared, however, found a basis for the cooperation of the American republics joining in support of a system of inter-American arbitration; it recommended that the form of cooperation be developed, not officially by the various governments, but by trade and commercial organizations operating in the different republics; and it sought to have certain standards adopted for amending existing arbitration laws and other

standards embodied in rules of procedure to make voluntary procedures more uniform.

This report, in fact, was the basis of the resolution adopted by the Montevideo Conference approving the standards recommended and authorizing the establishment of an inter-American commercial agency to create the inter-American system of arbitration. The Pan American Union, upon which was laid responsibility for putting the resolution into effect, proceeded immediately to carry out that part of the resolution which had to do with the establishment of the inter-American arbitration facilities. Thus was entrusted to the American Arbitration Association and the Council on Inter-American Relations the task of creating, under the auspices of the Pan American Union, the arbitration machinery contemplated, and the invasion was launched. As the Council was dissolved in 1936, the Association has since continued to sponsor the work of the Commission, providing it with the necessary headquarters, assistants and facilities.

It was not until 1939 that commercial arbitration could be said to span the Western Hemisphere, to the North as well as to the South of the United States. In that year the Canadian-American Commercial Arbitration Commission was set up with its own rules of procedure and arbitration clause for the settlement of any controversy arising in the course of American trade. A survey of the Provincial arbitration laws is about completed, indicating that agreements for the settlement of future and existing disputes are as effective in Canada as in the United States.

Thus throughout the Western Hemisphere, from North to South and East to West, peace follows trade routes and each commodity is unconsciously a carrier of goodwill. Throughout the Western Hemisphere no commercial dispute need cause war, dissensions, misunderstandings or differences, for the remedy is immediately at hand.

ORGANIZATION

The Inter-American Commercial Arbitration Commission was formally established in September, 1934. Immediately it proceeded to complete its organization and now has headquarters in Rockefeller Center at 9 Rockefeller Plaza, New York City, where it has an impressive hearing room decorated with the flags

and seals of the 21 American Republics, an administrative staff, and general offices.

The first task was to organize the Commission and its work so it provided for a central administrative organization that would leave to a National Committee in each Republic the highest degree of autonomy in conducting arbitration under its established laws and practice, while at the same time centralizing responsibility. This has been accomplished by the adoption of a constitution defining the Commission's powers and responsibilities, and by authorizing the appointment of National Committees in each Republic.

Under this constitution each National Committee assumes, as its chief responsibility, the creation and administration of an Inter-American Commercial Arbitration Tribunal in the Republic wherein it is located; the organization of a panel of arbitrators; and the promotion of amendments to the existing arbitration laws whenever such laws are not in harmony with the standards approved by the VIIth International Conference of American States.

A second task facing the Commission was the preparation of Rules of Procedure that could be used in each Republic under the prevailing arbitation law and established practice and at the same time possess a degree of uniformity sufficient to attract inter-American disputants and to give assurance of impartial arbitrators and a proceeding resulting in an effective award.

The Rules of Procedure prepared by the Commission are based upon those of the American Arbitration Association, but are drafted in a sufficiently elastic form to be applicable under the arbitration laws of any of the Republics. In order to facilitate their administration, each Republic has a committee which functions as the administrative body to receive applications for arbitrations and to initiate proceedings in whatever Republic the arbitration is to be held. This decentralization is made necessary by the distances and differences in nationalities.

Briefly the outstanding provisions of the Rules of the Commission are: Parties may submit disputes to arbitration under these Rules, either under arbitration clauses in contracts or under special agreements to arbitrate an existing controversy. When a controversy arises, the party desiring arbitration notifies the National Committee in the Republic where the arbitration is to

take place, or if such Committee is not yet functioning, he notifies the headquarters of the Commission and the facilities of the Tribunal are immediately made available. The method of selecting arbitrators may be specified by the parties, but if no such method is specified the Arbitration Committee, subject to the governing arbitration law, will nominate, from its Panel, qualified persons and send identical lists of such selections to both parties to the controversy. The parties may eliminate from such lists one-third of the names without giving the reasons for such elimination and any additional names for stated reasons. From the names remaining on both lists, the Arbitration Committee then selects the required number of arbitrators. According to the Rules, such number must always be uneven.

Hearings may be either verbal or by correspondnece, according to the preference of the parties and the distances involved. Awards are by majority votes and are rendered within thirty days from the date of closing the hearings (unless such time is extended by mutual agreement of the parties). Under this system all administrative details are taken care of by the Commission (or its local administrative committee) so that parties are relieved of all responsibility except that of presenting their case and the evidence. A special advantage of these rules is that the procedure is uniform in all of the American Republics insofar as the arbitration laws permit.

These rules of procedure are so constructed that they provide for a complete and impartial administration of the entire proceeding and for safeguarding each step from default, neglect, delay, or failure of the parties to proceed or to abide by the award.

The Commission believed an inter-American system of arbitration would be incomplete were it only to comprehend the settlement of existing disputes. Notwithstanding that arbitration clauses in contracts are not legally valid and binding in all American Republics, the Commission proceeded to draft an arbitration clause and to recommend its use in contracts as a foundation for the control of future disputes.[1] This action is in accordance with the standards established by the VIIth International Conference.

[1] "Any controversy or claim arising out of or relating to this contract or the breach thereof, shall be settled by arbitration in accordance with the Rules, then obtaining, of the Inter-American Commercial Arbitration Commission. This agreement shall be enforceable and judgment upon any award

RECORD OF ACTIVITIES

There are problems in inter-American trade which give rise to just as much ill-feeling as a dispute, without being actually in the class of arbitrable controversies. Some of these problems arise from unfair trading practices. Realizing that claims against a few exporters in the United States, whose practices might justify the complaint, would tend to undermine confidence in United States exporters generally, the Commission has created an inter-American Business Relations Committee. This Committee is working in cooperation with the National Association of Credit Men, the Bureau of Foreign and Domestic Commerce of the Department of Commerce and other governmental and state agencies which act in an advisory capacity in this effort to clear complaints against United States exporters. When the complaint is against a Latin-American exporter, the Commission acts through its National Committees in the different Republics.

Frequently the practice complained of arises from ignorance or carelessness and is easily corrected through the intervention of a neutral agency such as the Commission. When such friendly intervention is insufficient, the influence of individual members of the Commission or its Committees may be called upon and in the United States the effective cooperation of the United States Post Office authorities has been obtained in instances where there seemed to be grounds for a claim of fraudulent use of the mails in advertising.

Hardly a case referred to the Commission but has been satisfactorily adjusted, many times without recourse to the formal process of arbitration. The mere mention of the word and the intervention of friendly, disinterested persons have shown a vitally important sub-strata of goodwill that rises to the surface with each exposed controversy. The following cases illustrate this assertion:

A New Jersey firm supplying an international service entered into an agreement with an agent in a South American Republic to represent it in securing business in that country, the arrangement having been made through a third party traveling in South America. Price lists were supplied and a number of orders se-

rendered by all or a majority of the arbitrators may be entered in any court having jurisdiction. The arbitration shall be held in ———— or wherever jurisdiction may be obtained over the parties."

cured and filled. Later a misunderstanding arose as to the agent's right to receive commissions on certain shipments, due to a doubt in the seller's mind that the agent had secured the business on his own efforts. At any rate, no remittance was made, and there the matter rested until it was referred to the Commission at the suggestion of the Department of Commerce. A full record of the transactions was received by the Commission on January 7; four days later a representative called upon the seller in New Jersey and presented the facts as received from the agent; on January 14, the seller's check in the full amount of the commission was received and transmitted to the agent. A friendly letter from the seller to the agent cleared up the misunderstanding and restored an amicable relationship between the two.

In another matter, a Chilean firm sold a quantity of chemicals to a company in New York on an F.O.B. contract, the cost of wharfage, embarking, consular duties, etc. being for the seller's account. A charge of $1,400 made by the steamship company for "stowing and trimming" the shipment was deducted by the buyer in remitting payment, and liability for this charge was disputed by the seller. Following reference of the claim to the Commission a call made upon the buyer disclosed the shipper's obvious misunderstanding of the meaning of "stevedoring," charges for which constituted the largest deduction. Shortly thereafter the attorney of the Chilean firm, who happened to be in the United States, met representatives of the buyer in the Inter-American Tribunal and reviewed the contract and correspondence. As a result the seller's attorney was convinced of the reasonableness of most of the buyer's deductions. A suggested offer of settlement was made by the attorney and accepted by the buyer, whose check was promptly delivered to the Commission for transmittal to the firm in Chile.

In still another matter, a shipment of Panama hats was made by a firm in Ecuador to a New York buyer in accordance with the latter's specifications. Shipment was made in bond, allowing the consignees an opportunity to inspect the merchandise before taking delivery. Considerable time had elapsed after delivery when the importer made various claims that wrong sizes and styles had been shipped and refused to pay for the goods, which he continued, however, to hold. Considerable correspondence between the parties failed to dispose of differences concerning the shipment and the matter was referred to the Commission.

A conference with the New York firm resulted in its agreement to arbitrate the controversy, but before the proceedings could be arranged the dispute was terminated by a voluntary agreement of the buyer to pay for the goods in full.

The records of the Commission contain scores of such cases in which it has been asked to use its good offices in untangling snarled threads in the fabric of inter-American trade. Nearly every American Republic—Argentina, Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay and Venezuela—have been represented by the parties in dispute. Questions have involved a wide range of grievances, such as failure to ship merchandise, defective or damaged shipments, refusal of buyer to accept delivery, interpretation of contract terms, demands for refunds, failure to pay claims of agents, fraudulent inducement to invest money, differences arising from currency problems, and many other typical and complex problems arising in the course of inter-American trade.

From the standpoint of international trade and "big business," these transactions are, perhaps, of minor importance. But goodwill is a fragile article, and its quality is made up of the feeling the business men of one country bear toward those of another country. If individuals in Ecuador, let us say, have no goodwill toward individuals in the United States and no confidence in their business ethics or the quality of their products, and if business men of the United States hesitate to venture into South American markets, "Good Neighbor" resolutions and trade treaties will have little effect.

THE FUTURE

Rapidly and effectively as the Commission is proceeding in clearing inter-American trade routes of commercial disputes, it is not satisfied to be only a remedial or corrective body; it deems to be wasteful of goodwill and cooperation the habit of waiting until a dispute arises. It is, therefore, carrying on an educational campaign throughout the Western Hemisphere to have the Commission's arbitration clause put in every inter-American contract, thus broadening the platform of inter-American peace. It is studying trade practices with a view to proposing inter-American trade standards which, when adopted or

used in different Republics, will eliminate the causes of disputes or even the need for arbitration.

By removing the differences and misunderstandings that lead to distrust and ill-will, the Inter-American Commercial Arbitration Commission is forging a link in the chain of commercial peace and hemisphere defense that is being built on the Western Hemisphere. The completion of the arbitration system launched by the Pan American Union less than ten years ago can be nothing but fortuitous in a situation where economic solidarity and commercial peace and business confidence are occupying so profoundly the attention of all of the American Republics.

CREDIT PROBLEMS IN INTER-AMERICAN TRADE

KENNETH H. CAMPBELL *

THE foreign credit executive associated with an American manufacturer is admirably prepared to analyze adequately the foreign credit standing of his commercial customers in South America and has been for many years. Mention has been made of the fact that the American manufacturer has suffered large credit losses in engaging in trade with Central and South American importers. Such a statement is a deliberate falsification of the facts, as is indicated by a survey made early in 1941 of the credit losses of members of the Foreign Credit Interchange Bureau of the National Association of Credit Men from 1937 to 1940.

In this survey 42 per cent of those replying stated that they had suffered no such losses during the four year period covered. A number added that they had no losses since 1932 or 1933. Another 14 per cent of those replying characterized their losses by such expressions as "negligible," "insignificant," "inconsequential," "practically nil" or "too small to compute." Definite percentages were mentioned by another 23 per cent of those replying, who stated that their credit losses never exceeded one-half of 1 per cent in any one of the four years surveyed. In this group many suffered this negligible loss in only one of the years mentioned, going through the three others without any loss whatever.

The firms replying to this questionnaire and furnishing their information about credit losses represent a complete cross-section of the American firms engaged in export. They are manufacturing exporters who carry on a consistent and aggressive foreign trade, and whose foreign sales represent a substantial part of their production. Credit terms are extended to credit-worthy customers up to 120 days Date Draft.

While this survey was not exclusively a Latin American survey, the Latin American market represents an outlet that takes some 75 per cent of their total export volume.

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To make an adequate commercial credit judgment requires complete information in regard to the internal credit conditions of a specific market, which must merge with the general and international financial position of the country in question, both of which have had in the past great importance in the granting of commercial credit.

The internal credit conditions presuppose that full knowledge is available as to the purchasing power of the market in question, the principal export commodity, whether the country exists primarily on the exportation of raw materials, or whether it is industrialized, such national characteristics as may be known about the market in question, for example, the temperament, thrift, energy, integrity, etc., of the business community. All of these are among the important tools needed by the export credit executive to develop the necessary background generally known as internal credit conditions.

The international financial position of a market is one that bears careful scrutiny, particularly the question as to whether or not the country is creating enough exchange by its export shipments to take care of its foreign debt charges, if any, plus its dollar commercial obligations.

Into this whole picture of the international financial position of a market also comes the problem of whether exchange and import restrictions exist. If so, how are they set up and what are the immediate prospects of tightening or easing of these restrictions.

While the matter of exchange and import restrictions has been a source of great concern to American exporters during the past ten years, it is interesting to note that the survey on credit losses above mentioned also included the question of exchange losses, if any, during the same period, namely, 1937 to 1940.

With respect to losses due to exchange, 70 per cent of those who replied indicated that they suffered no loss whatever during the period under review—1937 to 1940. The balance of those replying indicated that while they had suffered exchange losses in this period, in most instances this loss was negligible, ranging to less than 1 per cent.

The American manufacturer in considering credit terms to Latin American buyers must, therefore, distinguish between country and customer credit, and while the credit standing of a particular buyer might be excellent, the economic situation of

a particular area has, in the past, necessitated the American exporter to take drastic steps to protect his own position. This is particularly true when the situation existing involves foreign exchange, import and quota restrictions, curtailment of export markets of a particular country, or similar impediments. In general, the credit standing of Latin American importers is of the highest. While it is true that there are some buyers who are distinctly of a "non-credit worthy type," the credit responsibility of the average Latin American importer is impeccable.

The 26th Semi-Annual Survey of Commercial Credit and Collection Conditions in Latin American Markets Covering the First Half of 1941 brought out the fact that under "Commercial Collections" all the markets in South America were rated "Prompt" or "Fairly Prompt," none being "Slow" or "Very Slow" in their commercial collections. This is a very encouraging situation.

One reason for this favorable situation, as is well known, is that Latin America is at the moment being intensively developed as a source of strategic and critical materials necessary to our own Defense Program. The United States is making every effort to increase its stock piles of tin, manganese ore, copper, nitrates and other minerals, and we have also materially increased our imports of wines, cheese and other Latin American farm surpluses. These increased imports and a continued development of Latin American resources are all part of a gigantic Western Defense Program. By increasing our imports of these various items, we help the Latin American countries avert the consequences of the loss of their European markets. The dollar exchange thus created helps in laying a firm foundation for a sound internal commercial credit structure in most of these countries.

Our government has embarked upon a program of preemptive buying in some of these markets, and while this situation is momentarily satisfactory, every effort should be made by our government as well as by our industrialists to continue the importation of these strategic materials when the war is over.

About a year ago there was a great deal of comment, and many statements were made and published, about the failure of the American exporter to cooperate and to extend credit to buyers of Latin American countries. Very seldom has it been possible to encounter a complaint of this sort which cites any

particular company that has been refused current and customary credit terms. The anonymity and generalization of both of these complaints have made it very difficult to investigate them in an intelligent and thorough manner. This fact has led many to the belief that possibly a great many of these statements were "inspired" and represented, not the reflection of an actual condition, so much as a desire to draw a "red herring" across the trail of the United States commercial enterprises in South America.

It is true that there is a large measure of business with South America which is financed upon a Letter of Credit basis, such business, of course, being of a special nature and not the general run of United States mass produced merchandise. The majority of United States imports from South America are paid for upon a Letter of Credit basis, and the South American exporter has cash on the line for their products, such as coffee, cacao, copper, bananas, linseed oil and numerous other items.

As previously stated, a large percentage of regular commercial export transactions are carried on under sales terms which grant credit accommodations ranging from 30 days to 6 months, thus enabling the Latin American importer to turn over the merchandise before payments for the importation become due.

From the facts presented herein it can be readily seen that the commercial credit and collection procedure followed by reputable businessmen in inter-American trade has met with cooperation on the part of all concerned, and few, if any, problems of great difficulty have arisen over the years. For example, few concerns and individuals go bankrupt in the Latin American countries, where the business mortality is not as great as in the United States. Careful vigilance on the part of importers and exporters of the inter-American countries together with the three C's of the credit world—Character, Capital and Capacity—have kept disputes arising over credit matters to an absolute minimum. It is true that some slowness in collections is occasionally noted in specific accounts, but such cases are always amenable to moral suasion action and are settled without any great difficulty, lawsuits being very rare.

While there are few, if any, cases wherein the machinery of the Inter-American Commercial Arbitration Commission might be used to settle disputes arising out of credit matters in inter-American trade, there is a decided field for action on the part

of the Commission in settling trade disputes that might arise in misunderstandings as to nomenclature, definition, etc., in inter-American trade.

For this reason the sub-committee on Inter-American Business Relations, which has recently been formed under the auspices of the Inter-American Commercial Arbitration Commission, will act as a center to which misunderstandings may be referred. This was found necessary because so many new people, who have never heretofore engaged in Latin American trade and are unfamiliar with the language and customs, have unintentionally made mistakes.

An example of these misunderstandings of nomenclature and definitions is found in the case of a shipper in a South American country who sold a cargo of merchandise on an F. O. B. vessel basis, all charges to be paid by the seller, and became confused when the American firm deducted *stevedoring* charges, because in the exchange of cables he had agreed to pay *stowing* charges. It was only after an opportunity had been had for defining the difference between stowing and stevedoring that a friendly settlement of a trade dispute was arrived at.

In another case, in which an American firm entered into a contract over the telephone with a firm in Central America through an interpreter, and had no definite knowledge of what actually took place, the firm found itself in a position of not having a definite commitment for material which it had contracted to deliver to a third party, thereby causing some loss.

It will be seen, therefore, that in the light of past experience, the immediate and friendly settlement of these misunderstandings will keep the differences in check and will avoid their becoming national issues, so that friendly relations may be maintained between sellers and buyers in the Western Hemisphere, either through arbitration or by friendly settlement.

THE TAKING OF PROOFS IN ARBITRATION PROCEEDINGS *

IT IS said, and correctly, that arbitrators are not bound by technical rules of evidence in taking proofs. It is also true, however, that awards are based upon hearings and upon the taking of evidence and such evidence, under arbitration law, when offered, must be accepted if it is pertinent and material to the issue.

Deprived, therefore, as arbitrators are of the guidance afforded to a court by technical rules of evidence and nevertheless bound to make their decisions according to the evidence, some simple suggestions for the guidance of arbitrators in taking of proofs will be of real assistance to them. In its Tribunals, the American Arbitration Association follows pretty generally the principles and practice subsequently set forth.

Kinds and Sources of Evidence. Evidence consists of the proofs offered to arbitrators by the parties in support of their respective claims. Such proofs are usually presented at a hearing, but parties may authorize arbitrators to take them in other ways, as, for example, when they waive an oral hearing or authorize independent inquiries or investigations or the taking of samples by the arbitrators.

Such proofs consist primarily, however, of oral evidence given at a hearing. These proofs may include documentary evidence or other kinds of written proofs to be found in communications, records, books or other writings. They are to be distinguished from what is sometimes called real evidence, which consists of samples, models, maps, merchandise, plans or materials, substances or designs. Arbitrators may be called upon to receive any or all of these kinds of proofs. Generally speaking, arbitrators rely almost solely upon the parties to produce the evidence and their witnesses, either voluntarily or upon the request of the arbitrators. There is an implied understanding when parties select arbitrators that such cooperation from the parties will be forthcoming.

* Reprint of Chapter IX of ARBITRATION IN ACTION, by Frances Kellor, published by Harper & Brothers, New York (1941); by permission of the author and the publishers.

General Rule as to the Admission of Evidence. Arbitrators possess wide discretionary powers with respect to the admission or exclusion of evidence. They may reject evidence which a court of law would be bound to receive or they may admit evidence which a court would have rejected. In the absence of any instructions to the contrary, they need follow no rules of evidence. They are, therefore, free to apply any rules or principles which in their conscience or judgment are most likely to produce a just and equitable award. In the exercise of this wide power, it is necessary that equal opportunity, under similar conditions, be given parties to present their evidence and any manifestation of bias or favoritism in accepting or excluding evidence is to be avoided.

Rule as to Materiality of Evidence. In the exercise of their discretion, arbitrators may be subject to limitations. One of these is the provision, in most arbitration laws, that the arbitrators may not refuse to hear evidence pertinent and material to the controversy. The court is authorized to determine whether such evidence has been excluded, upon the application of a party, and if so found, the court shall vacate the award.

Arbitrators are, therefore, faced with the very considerable problem of determining the technical question of what is pertinent and material evidence. This dilemma has led to the practice that, as no penalty attaches to the admission of evidence that is neither pertinent nor relevant, arbitrators will not greatly curtail the admission of evidence, even though they may be satisfied that it has no bearing on the issue.[1]

This rule has led to some criticism of arbitrators on the ground that they accept too much evidence and thus prolong the hearings. They have believed, however, in view of the severity of the penalty, should they fail to admit any particle of material evidence, that it is fairer to the parties, who are put to the expense of the proceeding, that they err upon the side of too much rather than too little evidence.

Limitations Imposed by Rules of Procedure. It is within the power of parties to indicate the nature of the evidence upon

[1] See *Lumbard* v. *Holdiman*, 115 Ill. App. 458 (1904), where the court held that the honest admission of incompetent testimony is not a legal defect, nor is it such misbehavior of the arbitrator as the statute means.

which the award is to be based. They may indicate such limitations in their own agreement, in rules of procedure or in by-laws. For example, they may prefer that the evidence be taken by "classers" or by sample, or by documentary evidence or by briefs, or in any way they determine.[2] In such instances, the requirement concerning pertinent and material evidence may be deemed to have been waived.

Rule as to Misconduct in Taking Testimony. The New York Arbitration Law, as well as some other statutory laws, provides when an arbitrator is proved guilty of any misconduct or misbehavior by which the rights of a party have been prejudiced, the award shall be vacated.

An illustration of an act of misconduct is the failure to accept pertinent and relevant evidence offered by a party, thereby giving him ground for the allegation that he has not had a fair hearing or a full opportunity to be heard. Courts regard the peremptory rejection of evidence rather severely and as coming within this provision.

It has also been held, where the attitude of the arbitrator in accepting or rejecting evidence was such as to create a presumption of bias or partially toward a party, the court shall vacate the award on the ground of misconduct.[3]

Exclusion of Privileged Communications. Notwithstanding the general rule that arbitrators are not bound by technical rules of evidence, courts have held that arbitrators should follow some of these rules. An illustration occurs in what is known as privileged communications. The Supreme Court of Michigan has held that an award should be set aside where the arbitrators had admitted the testimony of a physician concerning information acquired by him while attending a patient.[4] In this instance, there was an express statutory provision forbidding the disclosure by physicians of such information. The Georgia Arbitration Act expressly excludes testimony of a wife against her husband and *vice versa.*

[2] See AMERICAN ARBITRATION YEAR BOOK containing the procedures of many trade associations.

[3] See *McLaurin* v. *McLaughlin* 215 F. 345 (C. C. A. IV, 1914).

[4] *Dick* v. *Supreme Body of the International Congress* 138 Mich. 372, 101 N. W. 564 (1904).

Substitution of Expert Knowledge for Evidence. It seems to be a fairly well established rule that, although arbitrators are often chosen by reason of their special knowledge of a subject or experience in that field, they may not substitute such knowledge for evidence which the parties wish to produce.

This rule is based upon the theory that arbitrators chosen for their skill and knowledge are not selected for the purpose of relying upon them, but rather are they to be used in adducing pertinent evidence and in its evaluation. It seems, therefore, that parties in the selection of arbitrators have not so much in mind substituting their expert knowledge for proofs as they have bringing that knowledge and skill to bear upon their proofs so they may be fully comprehended and expertly sifted and weighed.

Hearsay Evidence. Although it has been held by the courts that an award will not be annulled because the arbitrators admitted hearsay evidence,[5] the practical rule requires that it be but sparingly admitted, for the reason that the party making the original statement cannot be examined concerning his statement; and, therefore any errors or distortion in its repetition cannot be checked or corrected. Nor have the arbitrators any way of knowing the attitude or circumstances under which the original statement was made.

Where exceptions to the rule against hearsay evidence have been established either by the courts or by statute, arbitrators are inclined to apply these exceptions. For example, general rules with regard to business entries, to admissions, to declarations against interest, etc., should be generally observed by arbitrators. Whenever there exists doubt as to whether certain testimony is admissible under one of the numerous exceptions, it would seem to be the better practice for the arbitrators to admit such evidence, since, as before mentioned, the exclusion of relevant evidence may lead to an annulment of the award.

Taking of Evidence in Presence of Parties. The taking of evidence in the presence of parties is so fundamental a right that it obtains in most arbitration proceedings. It is established by both practice and law and is based upon the principle that a

[5] See *Dana* v. *Dana*, 260 Mass. 460, 157 N. E. 623 (1927); *Kopeke* v. *E. Liethen Grain Co.*, 205 Wis. 75, 236 N. W. 544 (1931); also *Everett* v. *Brown*, 120 Misc. 349, 198 N. Y. S. 462.

party has the right to hear what is said against him and to have the opportunity to reply. That he may voluntarily waive the right as, for example, by not appearing at a hearing, after due notice, does not affect the fundamental principle.

Furthermore, a party may have objections to the proofs or have facts or arguments to refute them; or under the stimulus of his opponent's statements, he may produce facts which give a different character to his opponent's testimony. Only by both parties being present is it believed that the whole story may be placed unreservedly before the arbitrators.

Although this rule is not specifically laid down in arbitration laws, courts have so interpreted the New York Law as to establish definitely the principle, first, by defining the circumstances under which arbitrators may proceed *ex parte* and, second, by upholding this rule of evidence under the general provisions governing misconduct by an arbitrator.

So firmly is this rule followed that if arbitrators wish to make an independent examination of commodities or premises, or conduct any independent inquires outside of the hearings, they must 1) obtain the consent of the parties; 2) give the parties the opportunity to be present or 3) disclose the results of their inquiry at a hearing or in such a way that a party has the opportunity of replying to it, and of correcting or denying it.[6]

Questions concerning the exercising of this right of independent investigation may arise in several ways. Instances include the following:

It has been held, where the arbitrators had a test made after a hearing had closed, that the action taken was proper in order to confirm prior tests;[7] that the inspection of a machine after the hearing had been closed was a proper exercise of authority;[8] also where an arbitrator tested samples delivered to him by the

[6] See *Berizzi* v. *Krausz* 239 N. Y. 315, 146 N. E. 436 (1925), where the court held that the difficulty with this testimony is not merely that it is hearsay, but that it was collected and acted upon without knowledge of those affected and without opportunity to repel it. The court said: "We do not mean, of course, that an award will be vitiated by investigations in the absence of the parties if directed toward facts of trifling importance or facts of such a nature as to preclude reasonable contest." This may not include views or the ascertainment of physical conditions notorious and permanent.

[7] *Gerli* v. *Heinemann*, 258 N. Y. 484, 180 N. E. 243.

[8] *Robins Silk Mfg. Co.* v. *Consolidated Piece Dye Works*, 251 N. Y. 87, 167 N. E. 181.

buyer with the request for a test after the hearing had closed, the court said it did not lie in the mouth of the buyer to complain about such a test; [9] also an award should not be invalidated for the mere reason that one of the arbitrators consulted a friend of his during lunch about the case, particularly where the matter discussed was not material to the issue.[10] But, it was held improper for the arbitrator to receive a private communication from one of the parties, regardless of whether or not he was actually influenced by such communication.[11]

Other illustrations of how involved this question of outside investigations may become are afforded by two other court decisions: It has been held, where the parties expressly authorized the arbitrators to employ others as, for instance, accountants to check the balance of a general account, the award should still represent their own judgment and should not simply incorporate a statement of such accountants.[12] A different rule, however, seems to prevail where a chief engineer or other official was appointed as arbitrator. In this case, the designated officer was

[9] *In re Twin City Shellac Co.*, N. Y. L. J., January 21, 1936, p. 365, *Arbitration Journal*, Vol. 1, (1937) p. 205.

[10] *In re Tutein, Inc.*, 230 App. Div. 419, 245 N. Y. S. 125; aff'd. 256 N. Y. 530, 177 N. E. 127.

[11] *Hewitt* v. *Village of Reed City*, 124 Mich. 6, 82 N. W. 616 (1900).

"The rule is very strict in excluding any communication to an arbitrator, made *ex parte* after the case is submitted; and when such communication, which may affect the result, is made, it is not usual to enter into an inquiry as to whether the arbitrator was in fact influenced by it or not."

Another illustration of questions involving the admission of evidence is offered by the recent case of *Matter of Turberg, N. Y. L. J.*, Apr. 30, 1938, ARBITRATION JOURNAL Vol. 2, 1938, p. 287. One party had sent a letter to the Chairman of the Arbitration Board after the hearing was closed and without knowledge of the other party. The Court refused to set aside the award although the acceptance of the letter in evidence was "improper and beyond the scope of the request of the arbitrator." It was found, however, that the subject matter of the letter, although improperly received in evidence, had no bearing upon the material facts at issue and no prejudicial influence on the arbitrator's decision.

[12] *Shipman* v. *Fletcher* 82 Va. 601 (1886).

"It thus appears that the arbitrators did not themselves inspect the books, nor examine the vouchers, but that when the expert accountants, employed to make a statement from the books, made up this result in a condensed and general form, consolidating items and striking balances, they accepted the result without examination or inspection of books or vouchers, and rendered their award."

held justified in relying upon measurements and inspections of his subordinate.[13]

Although awards may be sustained where arbitrators, in consulting other disinterested persons, acted *bona fide* and based their award upon their own final judgment,[14] the making of such investigations is reviewable by the court and in each instance is construed in the light of that particular circumstance.

When it is neither practical nor expedient for parties to be present (as during laboratory experiments or when testing materials), it has been found to be desirable to have the parties, in writing, waive their right to be present and to have the experts report their findings at a hearing subsequently called.

When investigations are to be made after the close of the hearings, and no opportunity is to be afforded parties to examine or refute the findings, there should always be an express authorization by the parties to the arbitrators to make such investigations.

Taking Testimony under Oath. Whether witnesses shall be sworn, when giving their testimony, will depend upon the prevailing arbitration law. In some instances these provisions make it mandatory. In whatever jurisdiction the arbitration is to be held, this question is one to be examined before the testimony of the witness is taken.

Where there is no provision in the statute, it is not necessary to have the witnesses sworn, though it is a practice that may have beneficial results in making witnesses more circumspect in their statements.

The legal effect of administering the oath to witnesses differs according to the jurisdiction.[15] It seems, however, when the oath is not administered or when, as a result of the witness' knowingly giving false evidence, punishment for perjury is not incurred, that the witness will not aid a party by testifying falsely; for

[13] See Sturges on COMMERCIAL ARBITRATIONS AND AWARDS, p. 500, footnote 121, and cases there cited.

[14] See *Whitney Co.* v. *Church*, 91 Conn. 684, 101 Atl. 329 (1917).

[15] Under the United States Criminal Code, the effect of administering an oath to a witness is that he becomes liable for perjury if he willfully or knowingly and contrary to such oath makes a false statement. In certain states, the effect is identical. In other states, the effect is not so clear, as a charge of perjury may be confined to a judicial proceeding. But irrespective of the effect of the oath, proof to the court that a witness has wilfully and knowingly given false testimony may be a ground for vacating the award by reason of fraud having entered into its making.

the award may be vacated on the ground of fraud, and such false testimony has been held to constitute fraud.[16] Even though the witness escapes punishment, the parties suffer for his indiscretion. Whether the parties may waive the provisions relating to the swearing of witnesses will depend upon the law itself. Any undertaking to waive such provisions should be made in writing by the parties, so no doubt will remain concerning their intention.

Depositions. Not all testimony of witnesses is taken at hearings, for some of the laws authorize the taking of depositions of absent witnesses. When there is no such authorization, it is doubtful if such depositions can legally be taken, in which case affidavits may have to suffice.

Three statutory laws may be taken as illustrating variations in the method of taking depositions.

In Georgia, testimony is to be taken by commission as in a superior court, save only that the original interrogatories must be filed with one of the arbitrators and the commission must be issued by one of them, and the testimony, when taken, must be directed by the arbitrator who issued the commission. In Alabama, the arbitrators may issue the commission, if requested by a party, to persons residing outside of the county where the proceeding is being held, and no oath is needed to establish the credibility of the testimony.

Under the New York Arbitration Law, though no specific provision is made, arbitrators are given the same powers with respect to all proceedings before them which are conferred upon boards or a member thereof, authorized by law to hear testimony, and depositions may, therefore, be taken. The American Arbitration Association has prepared a special form for authorization by the parties for taking depositions of non-resident witnesses.

Affidavits by a party or his counsel, with a verification by some notary public or justice of the peace, may be received by arbitrators as being common instruments of legal proof.

Errors of Law or Fact. Arbitrators are not ordinarily held legally responsible for such errors in law or fact as they may

[16] See *Chambers* v. *Crook* 42 Ala. 171 (1868), where the court held that where a party resorts to false evidence and trickery to win his case he may not have the benefit of his perjury and trickery and the award will be vacated for such action.

make.[17] When, however, the arbitration agreement or a stipulation by the parties requires that the arbitrators decide the issue according to law, the award may be set aside for their failure to do so.[18] Also, when on the face of their award arbitrators indicate that they have undertaken to apply principles of law, the court, as appeared in the New Hampshire case, will hold arbitrators to making an award in accordance with such principles.

Where a judge or a lawyer is appointed as arbitrator, it is sometimes not clear from the language of the submission whether or not the parties meant to request such an arbitrator to decide the case according to strict principles of law. No better illustration can be found of the dilemma in which an arbitrator may find himself than was afforded under the following circumstances: A Federal Judge was appointed as arbitrator under a submission which provided for arbitration "for the purpose of determining the relative rights and liabilities of the parties by virtue of the contractual relationship existing between them." The Supreme Court of Michigan held that the arbitrator was not in error in

[17] In the *Matter of Burke*, 191 N. Y. 437, 84 N. E. 405 (1908), the Court held that such an agreement for arbitration is to be given effect, in the most liberal sense, as accomplishing a complete and final settlement of all existing controversies. The award thereunder is unassailable upon the ground that errors of law or of fact were committed. For it to be assailable at all, a ground must be found for charging the arbitrator with some misconduct, or with fraud, or with having exceeded his powers; or for the charge that the award, on its face, shows some mistake in figures, or in description, or some imperfection not going to the merits. See also *Fudicar* v. *Guardian Mutual Life Ins. Co.* 62 N. Y. 392 (1875); also *C. Itoh & Co., Ltd.* v. *The Boyer Oil Co.* 198 A. D. 881, 191 N. Y. S. 290 (1921); also *Wenger & Co.* v. *Propper Silk Hosiery Mills* 239 N. Y. 199, 146 N. E. 203 (1924).

[18] *Greenough* v. *Rolfe*, 4 N. H. 357 (1828), and *Palmer* v. *Von Wyck*, 92 Tenn. 397, 21 S. W. 761 (1893).

> "It is well settled that arbitrators are no more bound to go into particulars and assign a reason for their award, than a jury is for their verdict. The duty is best discharged by a simple announcement of the result of their investigations. It is equally well settled that they are not bound to decide according to law, for they are a law unto themselves, and may decide according to their notions of right and without giving any reasons. If, however, they undertake to decide according to law, and it appears from the face of the award that they have misconceived any principle of law applicable to the case, then the award is void." *King* v. *Falls of Neuse Mfg Co.*, 79 N. C. 360 (1878); *see Fudicar* v. *Guardian Mutual Life Ins. Co., supra.*

determining that he was bound by the submission to decide the case on strict principles of contract rather than on broad equitable principles.[19]

Weight of Evidence. The question not infrequently arises whether a court may examine an award to ascertain whether the decision of an arbitrator follows the weight of evidence. Ordinarily, unless it is apparent on the face of the agreement or of the award that the arbitrators intended or were required to do so, the court will not make this inquiry. In commercial arbitration awards, it is not usually customary to keep a stenographic record, nor do reasons for, or ways of arriving at, an award appear in that award or in an attached opinion. Under these circumstances, it would be extremely difficult for the court to determine what weight was given to any piece of evidence.

In labor arbitrations it is more customary to file opinions, for here the parties are deeply concerned over what evidence influenced the arbitrators. With an opinion before the Court and with a stenographic record which is sometimes taken, more clarifying court decisions may be expected.

Reference of Questions of Law to Court. When questions of law arise during a proceeding, the general rule is, when the arbitration law authorizes such references, that jurisdiction is thereby conferred upon the court to hear and determine such questions.[20] In the absence of such provisions, it is doubtful if the court may acquire jurisdiction in any other way. There are but a few arbitration laws that confer such jurisdiction. In some instances, as in Connecticut and Massachusetts, the consent of all parties is required; in other instances, as in Illinois, Nevada, North Carolina, Utah and Wyoming, the consent of one party alone is sufficient.

Where the statutory law requires that arbitrators be sworn to decide the issue according to the law and evidence, it is not

[19] *Acme Cut Stone Co.* v. *New Center Development Corp.*, 281 Mich. 32, 274 N. W. 700, 112 ALR 865, (1937).

[20] An illustration of a provision of this kind occurs in the Mass. law which provides that on application of a party at any time before the award becomes final, the Superior Court may, in its discretion, instruct the arbitrators upon a question of substantive law. An appeal founded on a matter of law may be taken from any order or judgment of the Court.

clear whether they may consult the court as to the law or merely suffer a possible annulment of the award should they fail to know or follow the law. When the law provides that arbitrators may state their final award in the form of a conclusion of fact for an opinion of the court on questions of law which shall conclude the proceeding and the arbitrators elect to do so, then they are bound by the opinion of the court. When the law provides that arbitrators may, on their own motion, and shall, on request of a party, submit any question of law arising during a hearing for an opinion of the court and either does so, that opinion is binding upon the arbitrators.

Ex Parte Proceeding. Parties are entitled to a hearing and due notice thereof and to have the testimony taken in their presence. When, however, a party has received such notice and fails to attend the hearing or appoint arbitrators or perform other terms of the agreement, the hearing may proceed without him. Whether an order must be obtained by a party from the court directing the arbitration to proceed or whether the arbitrators may proceed directly without him, will depend upon the arbitration law.

Whenever the default involves the making of the arbitration agreement, there should be no *ex parte* proceeding until that question has been referred to the court by a party and decided, for the question involves the powers of the arbitrators and they cannot be the judges of their own powers.

Whenever the default involves the appointment of arbitrators and no other method is provided and the court is authorized to make the appointment, none of the existing arbitrators may proceed *ex parte* before the full number authorized is completed.

Generally speaking, before proceeding to take evidence in an *ex parte* proceeding, every effort should be made to have all parties present; and when that fails, the arbitration law should be consulted as to whether a party should first obtain the direction of the court or urge the arbitrators to proceed directly with the hearing.[21]

[21] Ordinarily no personal penalty attaches to the failure of a party to appear on the day set for the hearing, but the Wash. statute provides that such a party is liable for all costs accruing on that day, unless in the opinion of the arbitrators his absence was unavoidable.

Stenographic Record of Testimony. It is not customary to take a stenographic record of the testimony by reason of the finality of the decision and absence of review on its merits by the court. Where, for example, it was sought to have an arbitrator adjudged guilty of misconduct by reason of his refusal to have such a record taken, the court held that where the purpose of requesting the record by a party was affirmatively shown to be to have the court review the rulings of the arbitrator upon testimony or points of law, the parties were not entitled to such relief and, therefore, the refusal did not constitute misconduct on the part of the arbitrator.[22]

It is, however, the right of a party to have a stenographic record taken and upon his request and agreement to pay its cost, the arbitrators shall order it taken.

Under the Rules of the American Arbitration Association, the clerk makes the necessary arrangements for taking such a record at the request of one or more parties, thus assuring the choice of an impartial stenograper.

Authentication of Documents. Authentication of documents is, at times, necessary with respect either to original documents or copies. Such authentication is intended to afford adequate assurance that a document submitted as an original is what it purports to be, and, if submitted as a copy, that it is an accurate reproduction of the original. There must, therefore, be some evidence in the nature of a certification from a person having the personal knowledge therefor. It is also necessary at times, especially in foreign trade arbitrations, to arrange for translations of documents or for the attendance of interpreters.

In their discretion, arbitrators may require such authentication or translations from the parties and may request the attendance of an interpreter who fulfils the requirements as to disinterestedness.

Testimony by Arbitrators and Clerks. The rule seems to be fairly well-established that arbitrators may not be called upon to testify in any court proceeding,[23] nor will the court require the

[22] See *Anderson Trading Co., Ltd.* v. *Brimberg* 119 Misc. 784, 197 N. Y. S. 289 (1922).

[23] *Matter of the Home Insurance Co.*, 126 Misc. 300, 212 N. Y. S. 567 (1925).

arbitrators to make statements as to the grounds for their decision or their reasoning in arriving at their conclusions. They are privileged to refuse to answer such questions and the court will protect them in this privilege.[24] Nor may an award be varied by the oral statement or interpretation of an arbitrator.[25] In other words, insofar as the arbitrators are concerned, the award stands as written and delivered.

On the other hand, a party may call upon the clerk in a proceeding to make an affidavit or statement concerning what transpired during a proceeding, and it may be presented to the court with other evidence. Such statements are, however, strictly limited to procedural or ministerial matters.

It is the policy of the American Arbitration Association to accede to such requests only when it seems that some injustice may be done unless the court has all the facts before it. It is, however, a mistake for administrators to participate frequently in court proceedings, and it is usually unnecessary when a careful record is kept.[26]

Preparation and Presentation of Evidence. A rather dangerous fallacy exists concerning the importance of evidence in an arbitration proceeding. It is often thought by both parties and counsel that because the arbitrators are so frequently laymen, technical rules of evidence do not apply and that since a proceeding is informal, there is little need for careful preparation of a case and for the orderly assembling of proofs and for their logical presentation. This attitude presents arbitrators with one of their gravest problems, namely, to decide a case on its merits when the merits lie with a badly prepared case as against one well presented. In such instances, the weight of evidence may run one way and the equities another, solely because of the inadequate presentation of the proofs by a party. Many an arbitrator has been sorely troubled by a decision he has had to make because of the inadequacy of proofs on one side or the other.

Counsel are particularly at fault, for they do not realize that a layman who is an expert in the field of the controversy gets

[24] Sturges on COMMERCIAL ARBITRATIONS AND AWARDS, p. 774 and cases there cited.

[25] See *Kennedy Bldg. Corp.* v. *Longworth*, N. Y. L. J., Aug. 30, 1927.

[26] Under this practice, it has rarely been necessary for a clerk in any tribunal of the Association to make an affidavit.

to the heart of a matter through a clear and conclusive exposition of facts and not by way of legal argument.

As a proceeding under arbitration laws and rules of procedure is judicial, and its findings and award are based upon evidence, counsel and parties appearing in the Tribunals of the Association are urged to prepare fully their evidence in order that justice may, in each instance, be done by the arbitrators.

SECOND AND THIRD QUARTERLY REPORTS OF THE MOTION PICTURE ARBITRATION TRIBUNALS

PAUL F. WARBURG *

"MOVIE Decree Proves Worth." That headline, in a New York daily over a story bearing a Washington, D. C., dateline, appeared within a few days after the close of the Third Quarter of the operation of the Motion Picture Arbitration Tribunals. The correspondent went on to report:

> "A sharp decrease in the number of complaints filed by motion picture theatre operators with the Federal Government since the consent decree went into effect was noted today by the Department of Justice. Spokesmen for the anti-trust division of the Department reported that the arbitration system set up by the terms of the decree has been 'quite effective' in clearing up inter-industry disputes, and that the Government itself is taking less and less of a hand in settling battles between exhibitors, producers and distributors."

This statement, together with the interviews with the heads of the leading motion picture exhibitor associations reported in the Motion Picture Press at the close of the Second Quarter of the operation of the Arbitration Tribunals, in which they expressed their approval of the operation of the arbitration system, gave much satisfaction to the Administrator. Mr. Ed Kuykendall, president of the Motion Picture Theatre Owners of America was quoted as saying:

> "Arbitration has undoubtedly proven beneficial; the benefits were not derived only from the system's actual function, but from its effect on those in dispute in the industry. I feel that the American Arbitration Association is doing its dead level best to do a fair and constructive job."

Mr. Abram Myers, General Counsel of the Allied States Association of Motion Picture Exhibitors was quoted as declaring that the American Arbitration Association appears to have done a good job in setting up the system, and that while he was not familiar with the panels in other cities, the Washington panel is a roster of the leading business and professional men in the

* Chairman, Administrative Committee of the Motion Picture Arbitration System of the American Arbitration Assn. This Report was prepared from material compiled for the Committee by J. Noble Braden, Executive Director of the Motion Picture Arbitration Tribunals.

city. Continuing, Mr. Myers said: "Numerous complaints, especially complaints that a distributor has refused to sell on 'some run,' have been settled. It is fair to say this would not have happened if a remedy by arbitration had not been provided. These amicable adjustments should be taken into account in measuring the worth of this system."

The Report of the First Quarter, appearing in the Spring number of the ARBITRATION JOURNAL, recorded the establishment of the thirty-one Tribunals and Panels and reported that 56 cases had been filed from February 1, 1941, the opening day of the Tribunals, to April 30, 1941.

In the Second Quarter, ending July 31, 1941, 38 cases were filed and in the Third Quarter, ending October 31, 1941, 45 additional cases were filed, making a total of 139 cases received in the Tribunals in the first nine months of their operation.

These cases were distributed among 28 of the Tribunals as follows:

Albany 2	Detroit 8	Omaha 1
Atlanta 2	Kansas City 3	Philadelphia 13
Boston 6	Los Angeles 4	Pittsburgh 3
Buffalo 6	Memphis 3	Portland 2
Charlotte 2	Milwaukee 2	St. Louis 5
Chicago 9	Minneapolis 4	Salt Lake City..... 1
Cincinnati 4	New Haven 5	San Francisco 4
Cleveland 1	New Orleans 4	Washington, D. C...10
Dallas 5	New York 26	
Denver 3	Oklahoma City 1	

(No cases were presented in Seattle, Indianapolis or Des Moines.)

By the end of the Third Quarter, October 31, 86 cases had been concluded—55 by Awards and 31 by settlement and withdrawal. It has not been possible to ascertain in most instances the terms of settlement or reasons for withdrawal. But whatever information has been secured has indicated that in a great majority of instances the exhibitor had made new contracts with the distributors on a more satisfactory basis than the previous ones, due to the filing of a Demand for Arbitration. Officials of exhibitor associations have stated at conventions and other public meetings that the opportunity to file a Demand for Arbitration under the Decree has brought about a great many settlements and satisfactory adjustments in the various exchange offices. Of the 139 cases filed during the nine-month period, 24 involved "Some Run" under Section VI, and 98 involved the question of

"Clearance" under Section VIII. Two cases were filed under Section X, which became operative August 31, 1941, and the balance of 15 cases involved more than one Section of the Decree.

Section X of the Decree provides that an exhibitor may demand arbitration of his right to a requested run provided that he meets certain terms and conditions set forth in that Section. On August 31, Section IV, dealing with the selling of motion pictures in blocks of five, and Section V, dealing with licensing theatres located in more than one exchange district, also became effective, but no cases have been filed under either of these two Sections.

The arbitrators who served in the hearings held in the Second and Third Quarters of the operation of the Tribunals were: Morton J. Hall, Albany, Special Agent of Massachusetts Mutual Insurance Company; Harold T. Patterson, Atlanta, attorney; William Harold Hitchcock, Boston, attorney and Chairman of Massachusetts Bar Examiners; John A. Daly, Boston, attorney and President of Cambridge Bar Association; Henry M. Channing, Boston, attorney; Weldon D. Smith, Buffalo, Treasurer of Adam, Meldrum & Anderson; Guy O. Bagwell, Charlotte, General Agent of Atlantic Life Insurance Co.; C. D. Kirkpatrick, Charlotte, General Agent of Mutual Life Insurance Co.; Richard F. Kuhns, Chicago, attorney and member of Chicago Crime Commission; Stanley Matthews, Cincinnati, Judge of Court of Appeals of Appellate District of Ohio; Anthony B. Dunlap, Cincinnati, attorney and ex-President of Cincinnati Bar Association, now Chairman of Ohio Bar Examining Committee; Herbert F. Koch, Cincinnati, Vice President of Guardian Bank & Savings Co.; Lloyd W. Klingman, Dallas, Manager of Dallas office of Equitable Life Assurance Society; L. M. Jordan, Dallas, Manager of Dallas office of Sears Roebuck & Co.; John A. Carroll, Denver, District Attorney of Denver; Hunter Lane, Memphis, attorney; Thomas P. Whelan, Milwaukee, Professor of English and Law, Marquette University; Philip J. Mackey, Saint Paul, attorney; F. H. Wiggin, New Haven, attorney and Past President of Connecticut State Bar Association; A. D. Gulliver, New Haven, Dean, School of Law, Yale University; Abraham A. Ribicoff, New Haven, attorney; Francis Adams Truslow, New York, attorney; William E. Stevenson, New York, attorney, former Assistant United States Attorney; O. K. Fraenkel, New York, attorney and Chairman of Hearings Board, Department of Welfare, New York City; Charles Ballon, New York, attorney; George A. Spiegelberg, New York, attorney; James A. O'Gorman,

Jr., New York, attorney; Michael N. Chanalis, New York, attorney; Paul L. Fitzpatrick, New York, Director of Policy & Sales Department, General Motors Corporation; Roland J. Christy, Philadelphia, Certified Public Accountant and attorney; H. Evans Rhell, Philadelphia, official of John T. Lewis & Bros. Co.; S. Eugene Kuen, Jr., Philadelphia, attorney; Walter H. Robinson, Philadelphia, attorney; Rupert C. Schaeffer, Jr., Philadelphia, Instructor of Business Law, Wharton School of Finance; William A. Wiedersheim, 2d, Philadelphia, attorney and member of Board of Governors of Philadelphia Bar Association; A. V. Murray, Pittsburgh, Secretary-Treasurer of Scaife Company; Horace F. Baker, attorney; Joseph K. Carson, Jr., Portland, attorney and former Mayor of City of Portland; W. J. Lowe, Salt Lake City, attorney and recently a candidate for Governor of State of Utah; Roger Sherman, San Francisco, attorney; F. J. Hellman, San Francisco, Vice President of Wells Fargo Bank & Union Trust Co.; F. A. Armstrong, St. Louis, attorney; Sefton Darr; Washington, D. C., attorney and former President of Bar Association of District of Columbia; L. M. Denit, Washington, D. C., attorney; Bolitha J. Laws, Washington, D. C., Judge of United States District Court; Joseph A. Cantrell, Washington, D. C., attorney; Herbert Cameron, Los Angeles, attorney and Examiner of R. R. Commission of the State of California.

In view of the general interest in the costs of arbitration under the Decree, a more complete survey was made of the costs incurred in the past six months and the following tabulation has been prepared for that period:

Exhibitor Complainant	
Average Assessed Filing Cost	$10.95
Average Assessed Arbitrator's Fees	11.64
	$22.59
Average Cost of Stenographer *	35.64
	$58.23
Distributors (Cost per Distributor per Case)	
Average Assessed Filing Costs	$1.44
Average Assessed Arbitrator's Fees	3.45
	$4.89
Average Cost of Stenographer †	24.75
	$29.64

* Stenographers requested by Complainant in only 23 of the 40 cases.
† Stenographers requested by Distributors in only 35 of the 40 cases.

The higher average cost to the exhibitor-complainant is explained by the fact that in practically all cases, as will be observed from the summaries below, there were a number of defendants in each case who shared the assessed costs, while the complainant alone bore his share. It may also be pointed out that this average is a *per case cost* and does not include the maintenance of the facilities, which cost is borne entirely by the distributors.

The above costs represent those incurred in arbitrations and do not include the costs of Appeal. It has not been possible, at the time of writing this report, to assemble the data on the costs of Appeal in the eight cases appealed and determined during the period covered. The three copies of the transcript required in all Appeals have been, in each instance, purchased directly from the stenographer without any record of the cost thereof being filed with the local Tribunals. The latter, however, are now securing information from the stenographers as to the actual cost in each of the Appeal cases and the figures will be available for the annual report.

It may also be interesting to note that in 86 per cent of the cases in which hearings have been held, attorneys have represented the parties. In only 14 per cent have the parties appeared without counsel.

Shortly before the conclusion of the first nine months of operation a report was made by the Administrator to the Budget Committee appointed in the Decree, consisting of Hon. Van Vechten Veeder, Chairman of the Appeal Board; Mr. Joseph H. Hazen, Distributors' Representative and Mr. Paul Felix Warburg, representing the American Arbitration Association, in order that they might prepare the budget for the next year. This report, which covered ten months and estimated the expenses to be incurred in the remaining two months of the Decree year, indicated a total cost of $300,000 for the establishment and operation of the entire system, which is $190,000 less than the amount provided for in the Decree. These expenditures, of course, represent only ten months of operation of the Arbitration Tribunals, inasmuch as the Tribunal did not actually begin to function until about February 1, 1941. It is significant, however, that the Administrator was able to operate at such a substantial saving over the amount originally provided by the agreement between the Government and the distributors and approved by the United States District Court.

During the nine months' operation there have been repeated requests from exhibitors, distributors and members of the bar for information concerning pending cases and decisions rendered therein. Following the custom established in the First Quarterly Report, published in the preceding issue of the ARBITRATION JOURNAL, summaries of the Awards made in the 48 cases concluded during the past six months are presented below.

SUMMARY OF AWARDS

Albany. American Theatre, Canton, N. Y., and RKO and Vitagraph, Inc. (*15-1F-41*).

Exhibitor complained that 14-day clearance granted to theatres in Ogdensburg, New York was unreasonable. Ogdensburg theatres did not intervene. The Arbitrator found competition between them to be negligible. The theatres are twenty miles apart. The Award provided there should be no period of clearance between the theatres.

Appeal: The Appeal Board set aside the Award on the grounds that the proper party did not appear as complainant. The theatre was owned and operated by a corporation (St. Lawrence Investors, Inc.) and the exhibitor, whose wife owned all the stock, had not shown authorization for bringing the complaint. Ten days were allowed by the Appeal Board for the appearance of the proper party and the correction of the papers. The correction was made and the Appeal on the merits is now pending.

Atlanta. Aaron H. Courshon, Parkway Theatre, Miami, Fla., and Paramount, Vitagraph and Loew's (*2-1F-41*).

The exhibitor claimed that the 100 to 150 day clearance granted to the Wometco Circuit was unreasonable and asked a reduction to 21 days. The Arbitrator disallowed the claim and stated that the evidence showed that the exhibitor had failed to avail himself of the opportunity to exhibit pictures for long periods after they were available.

Boston. Garbose Brothers, York and Capital Theatres, Athol, Mass., and Paramount, Vitagraph, 20th Century-Fox, Loew's, RKO (*3-2F-41*).

Intervenor: George A. Giles Company, Trimount Theatre, Inc.

Exhibitor claimed the clearance allowed Boston and Fitchburg was unreasonable and asked that it be eliminated on the grounds that Athol was not competitive. Seven hearings were held in this case and the Arbitrator found that the present clearance was reasonable and dismissed the complaint.

Appeal: The Appeal Board found that on the record the Arbitrator was justified in finding that Fitchburg, Gardner and Athol are in the same competitive area even though the competition between Athol and Fitchburg may be slight. The Board further found that the clearance of seven days granted by Loew's to the Fitchburg theatres over Gardner theatres and, as a result, over Athol theatres was unreasonable and reduced it to one day. In all other respects the Award of the Arbitrator was affirmed.

Boston. Lucien Descoteaux, Empire, Globe and Rex Theatres, Manchester, N. H., and Loew's, Paramount, 20th Century-Fox, Vitagraph, RKO (3-3F-41).

Intervenor: State Operating Company, Inc.

The exhibitor complained that the clearance of sixty days granted State theatre was unreasonable and asked that he be granted 28 days' clearance after first run, regardless of intervening run. The Arbitrator found the clearance unreasonable and fixed the maximum clearance between first and second runs at 30 days and third runs at 7 days, and that the third and later runs should receive no clearance.

Appeal: The Appeal Board reversed the decision of the Arbitrator and dismissed the complaint, stating that it found the testimony of the complainant inconclusive and the evidence insufficient to support the Arbitrator's findings and Award.

Boston. Waltham Amusement Corp., Grand Theatre, Taunton, Mass., and Paramount, 20th Century-Fox, Loew's, RKO, Vitagraph (3-4F-41).

The exhibitor claimed the 60-day clearance allowed the Strand and Park theatres to be unreasonable and requested a reduction to 14 days' clearance. The Arbitrator found that the competition between the theatres was not sufficient to warrant a 60-day clearance and reduced the clearance to 30 days. The Arbitrator also found that one of the distributors, Paramount, had an interest in the first-run theatres and, therefore, the Award should not limit or affect Paramount's right to license exhibition in its own theatres.

Buffalo. Richard De Toto, Genesee Theatre, Mt. Morris, N. Y., and 20th Century-Fox, Loew's, Universal, Columbia, Warner Bros., Inc., Monogram Pictures (16-1D-41).

Intervenor: The Family Theatre.

The complainant claimed that he had been refused pictures. The Arbitrator directed that he be given some run of pictures for the season of 1940-41 in accordance with the provision of Section VI of the Decree.

Charlotte. H. B. Ram, Patricia Theatre, Aiken, S. C., and Vitagraph, Inc. (17-1F-41).

The exhibitor complained that his theatre was the only one in North Carolina or South Carolina which had a clearance enforced against it in favor of another city. He asked that the clearance be eliminated. A consent Award was entered providing a 14-day clearance during the resort season, January to March, after first run Augusta. No change in clearance for the rest of the year.

Charlotte. Ellis Blumenthal, Lafayette Theatre, Winston-Salem, N. C., and RKO, Paramount and Vitagraph (17-2D-41).

Exhibitor complained that the above companies had refused to grant him some run. The Arbitrator found that the distributors had offered runs and dismissed the complaint.

Chicago. James Steininger, Lawn Theatre, Chicago, and Paramount, 20th Century-Fox, RKO, Loew's (5-3F-41).

Exhibitor complained that the clearance granted the Colony, Highway and Marquette theatres was unreasonable, and that he was entitled to play second week of a general release rather than fourth or seventh week. After a hearing the parties settled the matter and an Award was entered, dismissing the complaint.

Cincinnati. Willis Vance, State Theatre, Newport, Ky., and Paramount, 20th Century-Fox, Vitagraph, Loew's (4-1FH-41).

The exhibitor made two complaints—one under Section X and the other under Section VIII. Under Section X he asked for a third run and under Section VIII a reduction of clearance between his theatre and the Strand theatre. The Arbitrator awarded that Section X is not operative and that the evidence did not establish that the clearance granted between third and fourth runs was unreasonable and dismissed the complaint.

Cincinnati. Fred W. Rowlands, Parsons Theatre, Columbus, Ohio, and Loew's, RKO, Paramount, 20th Century-Fox, Vitagraph (4-2F-41).

The exhibitor claimed that the clearance of 21 days allowed the Markham theatre is unfair and should be reduced to 7 days. The Arbitrator found that there was insufficient evidence to sustain the exhibitor's complaint, found the clearance not unreasonable and dismissed the complaint.

Appeal: Decision pending.

Cincinnati. Fred W. Rowlands, Main Theatre, Inc., Columbus, Ohio, and Loew's, RKO, Paramount, 20th Century-Fox, Vitagraph (4-3F-41).

The exhibitor claimed that the 21 days clearance granted the Eastern theatre, an older house located in the neighborhood, was unreasonable and asked that it be reduced. The Arbitrator found the clearance not unreasonable and dismissed the complaint.

Appeal: Decision pending.

Dallas. Rubin Frels, Normana Theatre, El Campo, Texas, and Fox Film Corporation (7-2D-41).

The exhibitor complained the distributor had refused to license pictures and requested some run under Section VI. The Arbitrator found that the distributor had offered pictures and dismissed the complaint.

Appeal: The Appeal Board affirmed the Award of the Arbitrator.

Dallas. Campus Theatres, Inc., College Station, Texas, and Paramount, Loew's, RKO, Vitagraph, 20th Century-Fox (7-3F-41).

The exhibitor complained that the clearance of 30 to 45 days allowed the theatres in Bryan, Texas, over the Campus theatre is unreasonable, that there was no competition as the Campus theatre drew its support from the college. The Arbitrator found that the 30-day clearance in favor of the Palace theatre, the better theatre in Bryan, is reasonable but that the 30-

day clearance allowed the Queen and Dixie theatres was unreasonable and reduced it to 14 days. Loew's was exempted from the ruling of the Arbitrator as it might affect an existing franchise.

Denver. Joseph J. Goodstein Enterprises, Inc., Longmont Theatre, Longmont, Colo., and 20th Century-Fox, Loew's, Inc., Paramount Pictures, Inc. (22-1D-41).

Intervenor: Fox Estes Theatre Corp.

The exhibitor complained that Loew's and Paramount had refused to license pictures to him, but instead had licensed them to the Fox Longmont theatre, and asked for relief under Section VI. The complainant asked for a redistribution of the product in Longmont, Colorado. Four days' hearings were held and on the fifth day an Award was entered dismissing the complaint with costs to be paid by the complainant.

Denver. E. K. Menagh, Star Theatre, Fort Lupton, Colo., and Paramount, Loew's, Inc., Warner Bros., Inc., 20th Century-Fox Film Corp. (22-2FG-41).

The exhibitor complained that Paramount had withheld delivery of prints to favor a competitor, Rex theatre, Brighton, Colorado, and further that the clearance of 21 to 30 days granted the Rex theatre over the Star theatre was unreasonable. The Arbitrator dismissed the claim under Section X as complainant admitted that the Rex theatre was not a circuit theatre and, therefore, Section X did not apply. The complaint was also dismissed against Loew's and 20th Century-Fox on the complainant's motion. The Arbitrator reduced the clearance to be granted by the remaining distributors to 3 days.

Los Angeles. O. W. Lewis, Mission Playhouse, San Gabriel, Calif., and Paramount, Vitagraph, 20th Century-Fox, Loew's, Warner Bros. (9-2F-41).

Intervenor: Alhambra Amusement Co., United West Coast Theatres Corp., State Theatres, Monterey Park Theatre Corp., Norwalk Theatre Corp., Edwards' Theatre Circuit.

The exhibitor complained that the clearance fixed against this theatre was unreasonable and asked for a readjustment of clearance for the theatres in a number of communities in the Los Angeles territory. The complaint was dismissed at the beginning of the hearing as to 20th Century-Fox, Warner Bros. and Loew's. The Arbitrator found that the clearance provided was, in the main, reasonable, but provided that there should be established a 7-day clearance after the complainant's Mission Playhouse in San Gabriel as to certain competitive theatres. Two intervening theatres appealed.

Appeal: The Appeal Board reversed the Award and dismissed the complaint. The Board held that the Arbitrator did not have the power under Section VIII of the Decree to establish a clearance affecting theatres following the theatre of the complaining exhibitor, even though the Board stated there seemed to be evidence "strongly supporting the equity of the Arbitrator's Award."

Memphis. Petit Jean Theatre, Morrillton, Ark., and Loew's, Inc. (*25-2D-41*).

The exhibitor complained that the distributor had fixed the price of pictures offered to his theatre so that, in effect, it was a denial of pictures and sought relief under Section VI. The Arbitrator found the complaint was not sustained and dismissed it.

Milwaukee. Evansville Theatre, Inc., Rex Theatre, Evansville, Wis., and Paramount Pictures, Inc. (*19-1F-41*).

Intervenor: Jeffris Theatre Co.

The exhibitor complained that Paramount had refused to deliver prints and also claimed that the 14-day clearance granted by Paramount to the Jeffris theatre was unreasonable and asked that it be entirely eliminated. The Arbitrator dismissed the complaint under Section IX, but found the clearance unreasonable and reduced it from 14 days to 7 days, but qualified the Award to provide that 7 days would be allowed only when both theatres charged the same admission to adults. The clearance is to be increased to 10 days when the Rex theatre plays at an admission price of five cents lower and 14 days when the admission price is ten cents lower.

Minneapolis. David Gillman, Gayety Theatre, Minn., and Paramount (*10-3D-41*).

The exhibitor claimed refusal to sell pictures at a fair rental and requested relief under Section VI. During the hearing a consent Award was entered dismissing the complaint.

New Haven. Forest Theatre, Inc., Allingtown, West Haven, Conn., and Paramount, Warner Bros., RKO, Loew's, 20th Century-Fox (*26-1F-41*).

The exhibitor requested that the 14-day clearance between its theatre and the Vivoli theatre be eliminated. The Arbitrator reduced the clearance to 7 days.

New Haven. Saybrook Theatre, Inc., Saybrook Theatre, Saybrook, Conn., and RKO, Loew's, Vitagraph (*26-2F-41*).

The exhibitor complained that the Essex theatre, four miles from Saybrook, exhibited pictures on national release date without any clearance being granted to the Garde or Capitol theatres in New London, although a clearance was imposed against the Saybrook theatre in favor of the Garde theatre. The contracts with the Garde theatre did not provide for any period of clearance over the Saybrook theatre, but permitted Saybrook to play immediately following the Garde. The Arbitrator dismissed the complaint as no question of clearance was involved.

New Haven. Fred Quatrano, New Newington Theatre, Newington, Conn., and Loew's, Paramount, 20th Century-Fox, RKO, Vitagraph (*26-3F-41*).

The exhibitor claimed that the distributors had offered him pictures for his theatre, not yet completed, with a 30-day clearance requirement after

New Britain. He asked that it be reduced to 7 days. The Arbitrator reduced the clearance between the New Newington theatre after first run New Britain to 21 days, but provided that the Award should not apply to clearance that Vitagraph may allow between the Strand and Embassy theatres of New Newington.

New Orleans. Modern Theatres, Inc., Drive-In Theatre, New Orleans, La., and Paramount (*27-1D-41*).

The exhibitor complained that Paramount had refused to enter into a contract for licensing pictures and requested relief under Section VI. The Arbitrator found that Paramount had offered pictures but the exhibitor had refused to purchase except in lots of five only. The Arbitrator dismissed the complaint. The Section of the Decree providing for sales in lots of five was not operative at the time of the Award, April 22, 1941.

New York. Esquire-Great Neck Corporation, Squire Theatre, Great Neck, N. Y., and Paramount, Loew's, RKO, Warner Bros., Vitagraph, 20th Century-Fox (*1-2F-41*).

Intervenor: Skouras Theatres Corp., Northern Amusement Corp.

The exhibitor claimed that the 30-day clearance granted the Playhouse operated by Skouras Theatres Corporation over its theatre was unreasonable. Eleven hearings were held in this matter. Controversy was principally between the exhibitor and intervenor. The Arbitrator found that the Squire theatre was being operated at a loss and that the Playhouse was being operated at a profit, and reduced the clearance from 30 to 7 days. The Arbitrator also eliminated the clearance between another theatre at Little Neck and the Squire theatre. In this way the Arbitrator held that he was not required to consider the effect of his ruling on theatres that did not intervene and thus took the opportunity of protecting their interest from the effect of an Award.

Appeal: Decision pending.

New York. River Theatre Corporation, Central Theatre, Pearl River, N. Y., and Paramount, Loew's, RKO, Warner Bros., 20th Century-Fox (*1-5F-41*).

The exhibitor asked that the clearance of 7 days granted in favor of the Pascack theatre be eliminated. He further complained of the 7-day clearance granted the Rockland theatre and complained that the clearance granted against him was based upon runs in New Jersey and not in the New York area in which his theatre is located. The Arbitrator found the theatres to be in the same competitive area and that the clearance was reasonable and dismissed the complaint.

New York. Andora Amusement Corp., Liberty Theatre, Plainfield, N. J., and Vitagraph, 20th Century-Fox, Paramount, RKO (*1-6F-41*).

Intervenor: Strand Amusement Corp. of Plainfield, N. J.

The exhibitor complained that the 30-day clearance granted in favor of the Paramount, Strand and Oxford theatres, all operated by the Walter

Reade circuit, was unreasonable. He further complained that he previously had first run and asked that he be granted first run or second run with 7-day clearance after double features and 14-day clearance after single features. At the second hearing the Arbitrator held he had no jurisdiction to grant a run, as Section X was not operative and a request for a run could not be rendered under Section VIII. The Arbitrator awarded that the clearance be reduced from 30 to 21 days.

Appeal: Appealed by intervenor. Decision pending.

New York. Alvin Theatre Co., Colony Theatre, Sayreville, N. J., and RKO, Loew's, Paramount, Vitagraph, 20th Century-Fox (1-9F-41).

The exhibitor claimed the 14-day clearance allowed the Capitol theatre and the 14-day clearance allowed New Brunswick and Perth Amboy over Sayreville was unreasonable and asked that the Perth Amboy clearance be eliminated and the New Brunswick clearance be reduced to 7 days. The Arbitrator awarded that the clearance between Capitol theatre of South River and the Colony theatre of Sayreville be fixed at 7 days, and that the clearance between the theatres at Perth Amboy and the Colony theatre on first run be fixed at 7 days.

New York. Paustan Amusement Company, West End Theatre, Newark, N. J., and Paramount, Loew's, RKO, Vitagraph, 20th Century-Fox (1-12F-41).

Exhibitor asked that the 14-day clearance now fixed against its theatre in favor of the Ritz and Savoy theatres, operated by Warner Bros. be reduced to 7 days—the clearance which it enjoyed prior to 1929. The Arbitrator awarded that the clearance between the West End and the Savoy Theatres be eliminated and the clearance between West End and the Ritz theatres be reduced to 7 days.

New York. Raritan Amusement Co., Inc., Raritan Playhouse, Raritan, N. J., and Loew's, Vitagraph, Paramount, 20th Century-Fox (1-13F-41).

Intervenor: Sompru Theatre Co.

The exhibitor claimed that the 21-day clearance in favor of the Cort theatre over its newly erected playhouse at Raritan was unreasonable and asked that it be reduced to 7 days. The Arbitrator found the clearance unreasonable and reduced it to 7 days.

Appeal: Appealed by the intervenor. Decision pending.

New York. Cornwall Amusement, Inc., Storm King Theatre, Cornwall-on-Hudson, N. Y., and Loew's, Vitagraph, 20th Century-Fox, Paramount, RKO (1-14F-41).

Exhibitor complained that the 30-day clearance granted to Broadway and Ritz theatres in Newburgh was unreasonable in view of the fact that these theatres were only allowed 7 or 14 days clearance over other theatres in the same area. He asked that clearance be reduced to 7 days. The complaint

was dismissed as to Paramount because of its affiliation with the operator of the Newburgh theatres, and as to RKO because it did not sell to the exhibitor. A consent Award was entered reducing the clearance from 30 to 20 days.

New York. Gleason Amusement Corp., Colonial Theatre, Monroe, N. Y., and 20th Century-Fox, Vitagraph, RKO, Paramount (1-15F-41).

Intervenor: Netco Theatres Corp.

Exhibitor complained that the 14-day clearance allowed the Ritz and Broadway theatres in Newburgh, which theatres are twenty miles away, was unreasonable. At the first hearing the parties consented to an Award reducing the clearance from 14 to 7 days and dismissed the complaint against Paramount Pictures, Inc. because of its affiliation with the operator of the Newburgh theatres.

Philadelphia. David Silver, owner, Earl Theatre, New Castle, Del., and Metro-Goldwyn-Mayer Pictures (11-2D-41).

The complainant claimed that Metro-Goldwyn-Mayer refused to sell him product and further declared that being unable to obtain said product had caused him loss of patronage. The arbitrator, in an award dated June 30, 1941, construed the Decree as not giving Loew's that right. Plaintiff's theatre in New Castle is approximately six and a half miles from the Loew's Theatre in Wilmington. It is within the same competitive area. Loew's made no attempt to prove that the complainant did not meet the standards prescribed in Section VI and relied solely upon Section XVII. The arbitrator directed Metro-Goldwyn-Mayer to offer its pictures for license on a run to be designated by the distributor and upon terms and conditions not calculated to defeat the purpose of Section VI.

Appeal: The Appeal Board affirmed the decision of the arbitrator on October 10, 1941. The Appeal Board in its decision held that Section XVII does not permit the exclusive run policy claimed by the defendant and refused to construe it as a limitation of Section VI.

Philadelphia. Bryant Wiest, Hollywood Theatre, Elizabethville, Pa., and Loew's, Inc. (11-4F-41).

Intervenor: R. J. Budd, owner, Theatorium Theatre.

Complainant sought the same availability as the Theatorium theatre at Lykems, Pennsylvania, which had seven days clearance over complainant's theatre at Elizabethville, which is approximately seven miles from Lykems. Lykems played fourteen days after Pottsville, the key town in the territory. Until 1939 it received 14 days clearance over the Hollywood, which first exhibited Loew's pictures when it was opened in 1937. The arbitrator, in his award dated July 24, 1941, found the clearance of 7 days unreasonable and reduced it to 5 days.

Philadelphia. Samuel and Morris Somerson, Palm Theatre and Warner Bros. Circuit Management, 20th Century-Fox Film Corp., Loew's, Inc., Paramount Pictures, Inc. (*11-5F-41*).

Intervenors: Stanley Co. of America, and Northeastern Theatres, Inc.

The complainant attacked the clearance of the Kent, Wishart and Richmond Theatres, each of which had a stipulated clearance of 7 days over the Palm Theatre. In fact, the Kent played first, then the Wishart and Richmond, so that the Palm Theatre played 30 days after the Kent. The complainant asked that the actual clearance of the Kent over the Palm be fixed at not more than 7 days. The arbitrator, in his award dated August 1, 1941, found that the theatres were all highly competitive and that the clearance now in existence was reasonable.

Philadelphia. Hill Theatre, Inc., Chestnut Hill, Pa., and Vitagraph, Inc., Paramount Pictures, Inc., RKO Radio Pictures, Inc. (*11-6F-41*).

Intervenor: Rialto Theatre Company.

Edward I. Singer, President of Hill Theatre, Inc., claimed that the clearance of 14 days granted by Vitagraph, RKO and Paramount to the Sedgewick Theatre, Philadelphia, was unreasonable and requested that the arbitrator fix the maximum clearance of the Sedgewick Theatre over the Hill Theatre at 7 days. The arbitrator, in his award dated August 8, 1941, found that in reality the questions involved related to the playing position of the Hill and Warner's Rialto Theatre, although the clearance was keyed off the Sedgewick. The Sedgewick received 7 days clearance over the Hill. The arbitrator held that if he were to fix the maximum clearance of the Sedgewick over the Hill at 7 days, he would in reality change the fourth run of the Hill to third run day-and-date with the Rialto and that he had no jurisdiction to make a change of run. The complaint was dismissed on that ground and also on the ground that the existing clearance was reasonable.

Appeal: The Appeal Board in its decision and opinion dated October 24, 1941, concurred in the arbitrator's findings and conclusions and affirmed his award.

Philadelphia. M. Herman Bornstein, Hatboro Theatre, Hatboro, Pa., and Paramount Pictures, Inc., RKO Radio Pictures, Loew's, Inc. (*11-7F-41*).

Intervenor: Northeastern Theatres, Inc.

The operator of the Hatboro Theatre complained that the 7 days clearance granted the three miles distant Grove Theatre, at Willow Grove, Pennsylvania, was unreasonable and asked that the clearance be entirely eliminated. The arbitrator, in his award dated October 23, 1941, found that the clearance of 7 days was reasonable and therefore dismissed the complaint.

Philadelphia. Great Northern Theatre Co., Inc., North Philadelphia, and Warner Bros. Circuit Management, Paramount Pictures, Inc., 20th Century-Fox Film, MGM Pictures (*11-8F-41*).

Intervenor: Stanley Company of America.

The complainant's case was based on the fact that they were compelled to play pictures subject to 7 days' clearance in favor of Keystone Theatre,

Philadelphia, which in turn played 7 days after the Strand Theatre on the product of most companies other than 20th Century-Fox Film. 20th Century-Fox's first run is at the independently operated Carmen Theatre rather than Warner's Uptown or Strand Theatres, and its second run is at the Keystone Theatre. The arbitrator, in his award dated October 21, 1941, found that the clearance of the Keystone over the Great Northern Theatre was reasonable. He further found that in no event shall the Great Northern Theatre be required to play pictures of defendants Loew's, Inc. and Paramount Pictures, Inc., later than 21 days after the completion of the run of such Loew's and Paramount pictures at the Strand Theatre, and that in the event that the Strand Theatre does not play such pictures, the availability to Great Northern Theatre of such pictures shall be no later than 21 days after their date of availability to the Strand Theatre.

Pittsburgh. Herman Lorence, 18th Street Theatre, Erie, Pa., and Vitagraph, Inc., RKO Radio Pictures, 20th Century-Fox Film Corp., Paramount Film Distributing Corp. (*12-1ADH-41*).

This proceeding was brought under Section VI (some run) and Section X (designated run). The complainant claimed he had been refused a license to exhibit motion pictures and requested that the arbitrator direct the defendants to sell him a run of pictures under Section VI of the Decree. He also requested an award directing the defendants to sell the complainant's theatre a second run under Section X (designated run). The arbitrator, in his award dated June 13, 1941, found that Paramount and Vitagraph, Inc., had refused to license complainant's theatre second run but were willing to sell him a run after the American Theatre. 20th Century-Fox refused to sell complainant on any run but the arbitrator found that the defendant 20th Century-Fox was justified in refusing to license its pictures in complainant's theatre on some run and had not violated the terms of said Section VI by so doing. The arbitrator was satisfied that the distributors had acted reasonably to protect a satisfactory existing account.

Pittsburgh. Frank and Concetta Biordi, owners of Majestic Theatre, Ellwood City, and Radio Keith Orpheum Corp., RKO Radio Pictures, Inc., 20th Century-Fox Film Corp., Warner Bros., Inc., Vitagraph, Inc. (*12-2H-41*).

Intervenor: Monessen Company.

This complaint was filed under Section X (designated run) alleging in detail arbitrary refusals to license pictures to the complainants' theatre. There are two theatres in Ellwood City, complainants' Majestic Theatre and The Manos, a chain theatre. Prior to 1936 the Majestic was entirely first run and had all the Vitagraph product. Since that time Vitagraph has sold to The Manos and other distributors have sold first run to The Manos, with the result that the complainants were forced to operate partly on second run. The arbitrator, in his award filed August 14, 1941, dismissed the complaint. He held that Section X applied only to refusals to sell 1941-42 product. As to Vitagraph, Inc. the complaint was dismissed as premature, without passing on the merits. As to 20th Century-Fox and RKO, in spite

of the jurisdictional delinquency, the arbitrator dismissed on the merits because the complainants produced no evidence to support a claim of run discrimination by those companies.

Portland. P. R. Henderson, Rialto Theatre, Albany, Ore., and RKO Radio Pictures, 20th Century-Fox Film Company, Warner Bros., Inc., Metro-Goldwyn-Mayer, Inc. (*20-1D-41*).

The complainant claims that the defendants arbitrarily refused to sell him pictures on any run. The arbitrator, in his award dated June 14, 1941, dismissed the complaint.

Salt Lake City. J. H. Moron, Royal Theatre, Laurel, Mont., and Park Theatre, Red Lodge, Mont., and Paramount Pictures, Inc., 20th Century-Fox Film Corporation, Vitagraph, Inc. (*31-1F-41*).

Intervenor: Mary Roman, doing business as Roman Theatre.

The complainant claimed that inasmuch as he complies strictly with his contract price, that is, 10¢, 15¢, and 25¢ and because Roman Theatre of Red Lodge, Montana, does not comply with their contract prices, his theatre and all theatres in the Red Lodge trade area be given 150 days clearance over the Roman Theatre. The arbitrator in his award dated June 24, 1941, stated that the whole controversy related to the acts of the two Red Lodge theatres in competing with each other. This competition was very intense and bitter, involving, among other things, admission price cutting. He further found that had there been any question of clearance in favor of the Roman over the complainant's Park or Royal, some clearance would have been justified, but the evidence was to the effect that there was not and never had been any clearance between the Park and the Roman or between the Roman and the Royal, at Laurel, Montana. He dismissed the complaint without prejudice on the ground that there was no question of clearance involved.

San Francisco. A. C. Karski, Laurel Theatre, Oakland, Calif., and RKO Radio Pictures, Paramount Pictures, Inc., 20th Century-Fox Film Corp., Warner Bros., Inc., Loew's, Inc. (*13-2F-41*).

Intervenors: J. P. Dean, owner of Foothill Theatre, Eastmont Theatre, Golden State Theatre and Realty Corporation, Transbay Theatres, Inc., Dimond Theatre Co., Inc., Foothill Boulevard Amusement Co., Inc., Soland Theatre Corporation, Ltd.

The complainant claimed that the distributors licensed nine theatres in Oakland, California, with clearance over complainant, and asked that the maximum clearance imposed upon its Laurel Theatre be fixed at not more than 50 days following first run. The complaint was dismissed by an award dated August 28, 1941, pursuant to a general stipulation signed and filed by all of the parties to the effect that the above entitled matter be dismissed and the arbitrator requested to enter a dismissal as of this date, with costs to be paid by the complainant.

San Francisco. Harvey Amusement Company, Westwood Theatre, San Francisco, and RKO Radio Pictures, Paramount Pictures, Inc., 20th Century-Fox Film Corp., Warner Bros., Inc., Loew's, Inc. (*13-3F-41*).

Intervenor: T. & D. Jr. Enterprises, Inc.

The complainant complained that the clearance granted Sierra Theatre at Susanville, California, was unreasonable and requested that all clearance be eliminated and that the Westwood Theatre be given the same availability as the Sierra Theatre. The arbitrator, in his award dated October 3, 1941, found that the Westwood's availability was immediately after the Sierra and therefore no question of clearance was involved. The complaint was thereby dismissed for lack of jurisdiction.

St. Louis. Louis N. Sosna, Sosna Theatre, Mexico, Mo., and Loew's, Inc. (*20-3D-41*).

Complainant claimed that Loew's, Inc., refused to license their product to his theatre on some run. The arbitrator, in his award dated September 19, 1941, found that the defendant did not arbitrarily refuse to license pictures to the complainant's theatre under Section VI and therefore dismissed the complaint.

Appeal: Appeal by complainant. Decision pending.

Washington. Walbrook Amusement Co., Walbrook Theatre, Baltimore, Md., and 20th Century-Fox Film Corp., Vitagraph, Inc. (*14-1F-41*).

Exhibitor complained that the 7-day clearance granted the Ambassador, Forest and Gwynn Theatres was unfair. The Arbitrator found that the Ambassador was the outstanding theatre and awarded that the clearance allowed the Ambassador Theatre of 7 days was reasonable, but that the clearance should be eliminated between the Walbrook Theatre and the Forest and Gwynn Theatres, the Walbrook Theatre to play immediately following the Forest or Gwynn.

Washington. Westway Theatre, Inc., Westway Theatre, Baltimore, Md., and 20th Century-Fox Film Corp., Loew's, Inc., Vitagraph, Inc. (*14-3F-41*).

Exhibitor complained that upon opening his new theatre a 14-day clearance was imposed upon him in favor of Edgewood Theatre and that this required him to play day and date with smaller neighborhood theatres, Alpha and Irvington Theatres and was unreasonable and occasioned losses to his theatre. The Arbitrator awarded that the clearance between the Edgewood and Westway Theatres was reasonable. The Arbitrator refused to consider the question of clearance between the Westway, Alpha and Irvington Theatres as the latter had not intervened.

Appeal: Appeal Board affirmed the Award of the Arbitrator and stated that the Arbitrator's findings are "clear, comprehensive and, being amply supported by the evidence, conclusive."

Washington. L. W. Lea, Lea Theatre, Danville, Va., and Loew's, Paramount, RKO, 20th Century-Fox, Warner Bros. (*14-4FH-41*).

Exhibitor complained that clearance allowed the Capitol, Dan and Rialto Theatres, operated by Wilby-Kincey Circuit, of about 74 days after first run was unreasonable. He requested first run under Section X or a relief from the existing clearance. The complaint was withdrawn against Paramount because of its relations with the Wilby-Kincey theatres. The Arbitrator dismissed the complaint under Section X, as the evidence did not sustain a complaint under that Section. The Arbitrator, however, found that the existing clearance was unreasonable and reduced the clearance between first and second run to 30 days and between second and third run to 20 days.

Washington. L. W. Lea, Schoolfield Theatre, Danville, Va., and Loew's, Paramount, RKO, 20th Century-Fox, Warner Bros. (*14-5F-41*).

Exhibitor complained that the clearance granted to the Capitol, Rialto and Craver's Virginia Theatres, operated by the Kincey Circuit of approximately 74 days after first run was unreasonable and asked that it be reduced to not more than 14 days after first completion of first run. As in the previous case by the same complainant, the complaint was withdrawn against Paramount because of its relationship with the Kincey Circuit. The findings of the previous Lea case were adopted in this proceeding. The Arbitrator awarded that the clearance between first and second run should be reduced to 40 days and between second and third run should remain 14 days.

Washington. K. B. Amusement Co., Apex Theatre, Washington, D. C., and Loew's, Inc. (*14-6F-41*).

Intervenor: Warner Bros.

Exhibitor claimed that the 7-day clearance allowed the Calvert Theatre and the priority of run granted Uptown Theatre are unreasonable. He claimed that the theatres were in competition. The Arbitrator found that the Apex and Calvert were not in direct competition and awarded that no clearance should be granted either to Calvert or the Uptown Theatres over the Apex Theatre.

Appeal: Appealed by the intervenor, Warner Bros. Circuit Management Corp. Decision pending.

Washington. Samuel Mellits, Dentonia Theatre, Denton, Md., and Loew's, Inc. (*14-7F-41*).

Intervenor: Reese Theatre, Harrington, Delaware.

Exhibitor claimed 7 days clearance granted by Loew's to Reese Theatre is unreasonable as theatres are in competition and the Reese Theatre is in the Philadelphia exchange area. The Arbitrator awarded that the Dentonia Theatre shall be entitled to play Loew's pictures immediately after their exhibition at the Reese Theatre.

REVIEW OF ARBITRATION AFFAIRS

COMMERCIAL ARBITRATION

Motion Picture Tribunals Thrown Open to All Types of Arbitration. Through the generous cooperation of the Motion Picture Producers who are parties to the Consent Decree signed on November 20, 1940, the American Arbitration Association is authorized to use the Motion Picture Arbitration Tribunals in thirty cities as regional offices for the settlement of commercial and industrial disputes. This work will be in addition to the motion picture arbitrations that will be carried on in the usual way. The arrangement will greatly facilitate the American defense work of the Association in extending arbitration into defense industries from local as well as national stations.

The Association plans to organize Arbitration Councils in each state where these tribunals are located and to enlist the active interest and cooperation of residents of these states in bringing arbitration into its defense industries.

Activities of the Commercial Arbitration Tribunal. During the first nine months of 1941, the field covered by the arbitration activities of the Commercial Arbitration Tribunal of the American Arbitration Association was the largest in its history. Parties submitting matters for arbitration have represented seventeen states and 28 cities, in addition to New York. . . . . In one case in particular, the Tribunal was called upon to demonstrate its adaptability to the needs of the parties, who wanted the first hearing in Cincinnati, the second in Syracuse and the final one in a neutral city (New York being agreed upon). The arbitrators came from Philadelphia and New York; and the only costs incurred by the parties, in addition to the nominal arbitration fee, were the traveling expenses of the arbitrators. . . . . Michigan became the fourteenth state to bring its arbitration law up to date by an amendment under which arbitration clauses covering future disputes are valid and enforceable. The amendment provides, however, that the arbitration clause must be separately signed and executed by both parties. . . . . When a

steel manufacturer in Alabama and a utilities company in Georgia had agreed to arbitrate a controversy, but disagreed upon the place of the arbitration, a delay in the proceeding was prevented by reference of the problem to the Arbitration Committee of the Tribunal. A unanimous decision named Atlanta as the place for the hearing, which was held early in November. . . . . Arbitration of disputes on the airways, assured by the contract between ASCAP, NBC and CBS,* is further enlarged in scope by the announcement of the standard contract form of Broadcast Music, Inc., which includes arbitration clauses in all agreements with authors and composers. . . . . A request for speedy action came to the Tribunal on October 15th, when a suit for $2,500 was commenced in the City Court of New York City, for failure of a woolen importer to deliver merchandise. One of the parties was leaving for Europe by Clipper plane on October 25th. Counsel agreed to arbitrate, called at the Tribunal's headquarters and signed a submission, allowing one day for the selection of arbitrators. Before the week was out the hearing had been held and an award made.

Architects Amend Standard Form of Arbitration Agreement. Experience resulting from the use of the revised (Fifth) Edition of the Standard Contract Documents of the American Institute of Architects has made it clear that certain court decisions which have been rendered indicate a loophole in the present Standard General Conditions regarding arbitration. The intention was to provide for arbitration of all the architect's decisions excepting only those relating to artistic effect. It was also intended to provide for equally broad arbitration of disputes arising between the general contractor and his sub-contractors.

In some cases a dispute arises in a contract where the architect is non-existent or where his decision is not involved in the matter under dispute between the general contractor and the owner or between the general contractor and a sub-contractor. Court decisions indicate that in such cases a very limited interpretation is placed upon the Standard General Conditions as to the matters on which arbitration is to be considered mandatory. This unintended loophold in the General Conditions as now drafted in the Fifth Edition and previous editions will be corrected in the next edition, following recommendations made by the Committee on

* See page 306.

Contract Documents of the American Institute of Architects (of which William Stanley Parker is Chairman) and approved by the Board of Directors.

Meanwhile it has been suggested that architects deal with the situation by adding a new article to the General Conditions, as follows:

ARTICLE 45. AMENDMENTS OF ARBITRATION PROVISIONS

(a) Amend Article 37, sub-paragraph (o), first sentence, by adding a clause reading as follows:

"provided, however, that a decision by the architect shall not be a condition precedent to arbitration."

(b) Amend Article 39, by adding a fifth paragraph, reading as follows:

"Where an architect's decision or instructions are not required or are not available within a reasonable time, any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by arbitration."

In the May 1941 issue of *Building Congress News*, William Arthur Payne, Secretary of the Committee, calls attention to the fact that members of the American Institute of Architects are given authority in making contracts from now on to include these amendments in the documents. Contractors and sub-contractors are cautioned to insist that these amended clauses shall be made part of the contract, either by being stated in the contract form or by rider properly initialed and attached to the General Conditions when these are made part of the contract documents.

Arbitration Smoothes the Airways. A long and sometimes bitter dispute, which had for months affected millions of radio listeners throughout the country, was amicably adjusted early in November when the American Society of Composers, Authors and Publishers (familiarly known as ASCAP), on the one hand, and National Broadcasting Company and Columbia Broadcasting System, on the other, signed an agreement which will allow ASCAP's 1,250,000 compositions back on the airways of the two Companies, from which they had been banned since January 1, 1941.

The contracts run to December 31, 1949, at which time they will be renewable for a further period of nine years. Any differ-

ences arising during the life of the agreement will be submitted to arbitration under the Rules of the American Arbitration Association, and there is a further provision that if, at the time the contract is renewed, ASCAP requests more favorable terms, any resulting differences will be submitted to arbitration.

This new agreement adds one more link in the arbitration chain in the amusement world, which is now wholly committed to arbitration. Other groups providing for arbitration in the agreements of their members include Actors' Equity Association, American Federation of Radio Artists, Dramatists' Guild of the Author's League, Screen Actors' Guild, Artists' Managers' Guild, American Guild of Variety Artists, the American Guild of Musical Artists, and the history-making Motion Picture Arbitration System providing for arbitration of disputes between Producer-distributors and exhibitors, set up under the first consent decree ever to provide for arbitration.

Settlement of the Tacoma Narrows Bridge Claims. On the morning of November 7, 1940, a gusty wind blew across Puget Sound, accentuating the unpredictable swaying of the Tacoma Narrows Bridge—the third longest in the world at the time of its completion—and finally sent it crashing into the waters below.

From the very beginning of its construction the project had presented varied and difficult engineering problems, and almost from the day the bridge was opened to traffic a decided up and down movement developed which was so marked the bridge was facetiously called "Galloping Gertie."

Insurance on the bridge was carried in the amount of $5,200,000, its collapse being one of the perils insured against, and steps for adjustment were immediately taken. After a few preliminary discussions it was evident that the question of determining the measure of damage was so involved that considerably more data than was available at that time was necessary to determine the amount necessary to replace or restore the bridge to its original condition.

The policies of insurance contained a provision that the liability of the insurers was limited to the cost of replacing with materials of like kind and quality, and included the following clause to be invoked in the event of a disagreement as to the measure of damage:

> In case the Assured and this Company shall fail to agree as to the amount of loss or damage, each shall, on the written demand of the

other, select a competent and disinterested appraiser. The appraisers shall first select a competent and disinterested umpire and failing for fifteen days to agree upon such umpire, on request of the Assured or this Company such umpire shall be selected by a judge of a court of record in the State of Washington. The appraisers shall then appraise the loss and damage, stating separately actual loss on each item; and failing to agree, shall submit their differences only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally."

Engineers employed by both parties in an effort to determine the exact loss or damage submitted reports at considerable variance from each other, and for a time it looked as though the differences were headed for the courts and a long-drawn out litigation, which both parties wished to avoid. The presence of the clause in the policies, however, played its part, and the parties were able to arrive at an acceptable compromise, in which the companies raised their original estimate of loss from $1,800,000 to $4,000,000, and the Washington Toll Bridge Authority waived its claim for a total loss of $5,200,000 and accepted the compromise settlement of $4,000,000, on the theory that the piers had not been materially damaged and represented a salvage value of the difference between the total amount of insurance and the compromise adjustment. With the settlement of claims out of the way, plans for a new and finer bridge are rapidly taking shape and the dangers of litigation have been successfully hurdled.

Arbitration in Condemnation Proceedings in Oklahoma. Oklahoma, one of the few states with no arbitration statute on its books, has recently included a provision for arbitration in the Condemnation Procedure Act, which was signed by the Governor on June 4, 1941, and became effective August 21, 1941. The intent of the Act is to guarantee to property owners of the state just and fair compensation for property taken or damaged for public use, through the setting up of arbitration boards in each Congressional District of the State, to determine just compensation or damages after the court has made its order of condemnation. Two members of the Board are appointed by the Governor in each District, and the third is named by the judge of the court where the cause is pending.

As authorized by the Act, Governor Phillips appointed the

District members of the Boards on September 4th. Of particular importance is the Third District, in which is located the Denison Dam area, in which a number of disputes as to land values have arisen. Said Governor Phillips, of the appointees: "They are self-supporting citizens and property owners, with enough experience to know the value of property and arbitrate between the people and any agency seeking the land." As to the constitutionality of the bill, the Governor said: "I have heard some folks argue the bill is unconstitutional. We can prescribe the procedure for condemnation of land taken in the right of eminent domain."

Supplies to Russia Speeded by Arbitration. Foreign purchasing commissions contracting for war supplies in the United States have followed the example of American business men in calling upon arbitration to clear the way to delivery in the event of disputes arising. The French Purchasing Mission used arbitration provisions in contracts with suppliers, as does the British Purchasing Commission. Amtorg Trading Corporation, through whom supplies for Russia are cleared, is another user of arbitration clauses, and in a recently signed agreement for vital electrical equipment used by the Russian army, arbitration clauses have been included to guard against any contingency in the nature of a controversy or difference that might develop between manufacturer and purchaser to threaten delays in delivery of the equipment.

Ethical Standards for Arbitrators. Among the ethical standards established for arbitrators under the rules and practice of the American Arbitration Association are these:

> (a) An arbitrator should avoid the appearance of bias, and should not express opinions or views concerning the parties or the controversy before or after the award is made; nor should he
>
> (b) Indicate, by word or manner, that a decision has been reached before all of the evidence is received and before the award is signed by all or a majority of the arbitrators.

In a recent proceeding in a construction case, after the arbitrators and counsel for the parties had assembled, a message was received that one of the parties had been delayed by an automobile accident, and after some discussion an adjournment was agreed upon. One of the arbitrators, however, asked to see the papers in the matter, including the specifications. The arbitra-

tors then proceeded to look over the papers and to discuss them. One of the arbitrators expressed the opinion, concurred in by another arbitrator, that under the terms of the contract and the specifications, there seemed little foundation for a substantial part of the claim that had been made.

This discussion was overheard by the attorneys and the attending party, who had not departed from the hearing room. The complaining party, through his attorney, thereupon protested against any further proceeding before the two arbitrators who had expressed an opinion in advance of receiving evidence. Although the arbitrators declared they would not be influenced nor would their award be affected by their preliminary examination of the papers, they deemed it best to resign in the face of a doubt in the mind of the party that he would receive a fair and impartial hearing, and they were replaced by new arbitrators.

Arbitration Favored in Installment Buying.* Various installment interests in the state of New York are giving consideration to mediation and arbitration for handling all disputes arising out of installment selling. It is likely that within a comparatively short time a plan will be presented. It is expected that it will utilize the facilities of the American Arbitration Association.

Arbitration for settling installment disputes, according to those who have studied the subject, offers many advantages. It is contended that it will avoid costly litigation and at the same time improve relations between retail merchants on the one hand and consumers on the other.

In connection with credit jewelry selling, it is likely that mediation and arbitration will be instituted and that this will be done before the new legislation regarding installment selling takes effect on January 1, 1942. A substantial number of jewelers already have indicated willingness to adopt mediation and arbitration, favoring it as an additional means for stabilizing installment business.

Arbitration in the Cotton Textile Industry.† The cotton textile industry has long recognized that proper arbitration machinery

* Reprinted from COOPERATION, official publication of Associated Credit Jewelers of New York and New Jersey, Inc.

† Prepared for the JOURNAL by Lionel P. Adams, Secretary of the General Arbitration Council of the Textile Industry.

represents a wholly efficient and practicable method of adjusting commercial disputes with a minimum of disturbance of good will and of the even flow of business.

Prior to 1930 certain of the functional divisions of the industry—the cotton textile merchants, the converters, and the finishers—furnished arbitration facilities under their own separate and independent procedures. This small but constructive beginning brought about a growing realization of the desirability of more inclusive and centralized arbitration machinery—a tribunal modeled in a broad sense after the fundamental pattern of the industry itself and inspired by a realistic view of the importance of the smooth functioning of its underlying commercial operations.

The result was the establishment of the General Arbitration Council of the Textile Industry, which dates from 1930, and which now includes fourteen separate trade associations in various branches of the industry. Those associations which had previously provided separate arbitration then blended their facilities into the resultant central arbitration council.

The following organizations are now represented in and constitute the Council:

The Cotton-Textile Institute, Inc.
National Association of Cotton Manufacturers
American Cotton Manufacturers Association
Association of Cotton Textile Merchants of New York
Textile Fabrics Association
National Association of Finishers of Textile Fabrics
Textile Brokers Association
International Association of Garment Manufacturers
National Rayon Weavers Association
Association of Cotton Yarn Distributors
Wholesale Dry Goods Institute
National Association of Purchasing Agents
The Cotton Thread Institute, Inc.
National Association of House Dress Manufacturers

The official panel of arbitrators contains the names of representative and experienced business men from each of the constituent divisions.

The records of the General Arbitration Council reveal the wide variety of cases which have been settled under its rules. Its facilities have been made available in connection with transactions arising from merchandise produced not only in cotton mills, but also in mills producing synthetic yarns and fabrics, wholly

or in part. An important proportion of cases have involved the quality of merchandise, which is natural in an industry constantly concerned with the development of new and improved processes and products. Other cases have had to do with matters of proper delivery, special processing instructions, and many other problems arising from ordinary commercial merchandising transactions.

The many functions involved in the processing and distribution of clothes and cloth—the mechanical and engineering phases of spinning and weaving; the styling and designing problems of converting; the chemistry of bleaching, dyeing and finishing; the manufacture of the final product for wardrobe, household and industry; the various merchandising transactions from mill to ultimate buyer—all fit into a pattern made up of millions of commercial transactions.

The intricate nature of the industry itself explains why each product passes through many hands from the time it leaves the mill until it reaches the ultimate buyer. Each of these steps, whether it be related to processing or to distribution, is normally based on a contract providing for arbitration of any controversy arising thereunder.

Very few units in the industry perform all of the manufacturing functions necessary in preparing the product for the various merchandising steps to follow. Many mills confine their operations to the spinning of yarn from the raw fiber, others merely weave the yarn into an unfinished fabric, and others devote their attention to one or more of the processes which transform the unfinished material into an item ready for sale through the subsequent merchandising channels.

Each of these steps involves its own peculiar type of risk—risks which may be related primarily to the ever-present possibility of human error, and others which spring from general market conditions or whims and fancies of the buying public.

In any case, in the very nature of dealings between one individual and another, it is not always possible to anticipate developments leading to business controversies, and this industry is thoroughly convinced that the best way to keep the peace is to have such differences adjusted by impartial arbitration boards composed of men who have learned from their own business lives the fundamental principles necessary to qualify them to render a fair judgment of the problems brought before them.

INDUSTRIAL ARBITRATION

Industrial Arbitration Tribunal of the American Arbitration Association. In the conflict between the various ideologies of arbitration, the heated debate as to whether it shall be compulsory or voluntary, the demands and proposals for legislation, and the confusion between mediation and arbitration now so prevalent, the Industrial Arbitration Tribunal of the American Arbitration Association has gone steadily forward in its work along the path outlined at the time it was established, and has "stuck to its last" —which is providing voluntary arbitration machinery for the use of management and labor for the arbitration of disputes and differences *arising out of labor agreements.*

During the first ten months of 1941, the Tribunal received 145 matters for arbitration. These disputes arose in ten states (Connecticut, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York, Pennsylvania, Rhode Island and West Virginia), and covered a wide variety of questions. Briefly summarized, the following are typical matters on which the arbitrators were asked to rule:

Right to collect union dues in plant during lunch period.
Wage adjustments because of changed conditions of work.
Right to change wage scale fixed in contract due to increased living costs.
Right to vacation with pay.
Number of employees comprising basic crew.
Interpretation of contract as to whether it permits demand for increased wages.
Conformation of wages actually paid to schedule in contract.
Failure of employer to observe contract requirement as to shifts of workers.
Right of a group of workers to increased pay without increased work load.
Demand for discharge of non-union worker and payment of damages.
Claim of employer for exemption of certain employees from requirement to be union members.
Right to discharge worker for shortage in his accounts.
Unsubstantiated negligence as a basic for discharge.
Lay-offs of workers in violation of seniority.
Slackening of work as a sufficient cause for lay-offs.
What constitutes incompetence sufficient for discharge?
Right to dismiss employees due to unfavorable financial status of employer.
Whether employer may discharge workers in view of contract provision for no change in production method during life of agreement.
Rights to overtime pay.

Rates of pay for 2,500 union members, which question was left to arbitration in negotiating labor agreement.

Right of employer to institute 48-hour week provided in master contract between association of employers and union.

Whether or not a worker had paid or attempted to pay his union dues and was, therefore, in good standing.

Failure of employer to apply to union to fill vacancy.

Failure to divide work without favoritism against any group of employees.

An example of the speed and efficiency with which the Tribunal functions is provided by an arbitration which was held in Detroit. On July 23, 1941, the Association was advised that a conference at the Labor Commissioner's office to settle an existing strike disclosed that the American Arbitration Tribunal was named in the contract, and that the parties had agreed that if three arbitrators could be named at once, the strike would be called off. A list of Detroit arbitrators was immediately furnished and three men, acceptable to the parties, were chosen from the Panel. So quickly did the Association function, that the parties were not ready to proceed to arbitration on July 25, when arrangements for the hearing were tentatively made by the Association. The hearing, however, was held on July 28 and resulted in a unanimous award.

In another case, a contract was in process of negotiation between a New York department store and the United Department Store Workers Union. Most of its terms were agreed upon, but the parties found themselves in disagreement as to the applicability of the contract to a certain group of employees, and a deadlock threatened to tie up the negotiations. It was agreed, however, to submit this question of applicability to arbitration. The agreement to arbitrate was concluded on Friday, June 27; a hearing was completed on June 28, and the award was signed and delivered on June 30.

In still another matter, arbitrated in Buffalo, a strike of the employees of the Curtiss-Wright Company (Airplane Division) was averted in a wage dispute between the Union and the Company, upon an agreement to submit pending differences to arbitration under the Rules of the Tribunal. Here again the speed of the Tribunal was emphasized. Thirteen hearings were held, beginning June 24 and ending July 10, with a unanimous award of the five arbitrators arrived at on July 15.

In the great majority of matters submitted to the Tribunal an

arbitration provision had been included in the labor agreement between management and union out of which the difference arose. Typical companies, many of them in important defense industries, that have included provisions for arbitration in their agreements with labor are: Association of Uptown Converters, Sidney Blumenthal & Company, Bobbs-Merrill Company, Celanese Corporation of America, Curtiss-Wright Corporation, Eavenson & Levering Company, Ideal Container Corporation, Interwoven Stocking Company, A. D. Julliard & Co., London Character Shoes Corporation, New York Subways Advertising Co., Inc., Nitro Pencil Company, Publishers Association of New York, Ranger Aircraft Engines, Rubberset Company, D. A. Schulte, Inc., Standard Oil Company of New Jersey, United Box Corporation, Woolen Jobbers Association, and many others.

The arbitration provisions used by these companies vary considerably. In one instance the contract stipulates that if the parties cannot agree upon an arbitrator within twenty-four hours, either party may request the U. S. Department of Labor or the American Arbitration Association to appoint the arbitrator. In another agreement, it is provided that each side will appoint two arbitrators, the fifth member of the Board to be selected from the Panel of the Association. In still another contract, the parties agreed to submit differences under the Rules of the Tribunal, with the exception of the selection of the arbitrators, the Rules taking effect after the impartial arbitrator has been agreed upon.

Among the ninety-two unions which have called upon the Tribunal for services since it was organized are the largest industrial groups of both the CIO and the A. F. of L., such as the Textile Workers Union of America; United Electrical, Radio and Machine Workers of America, International Brotherhood of Teamsters & Chauffeurs; Bricklayers, Masons and Plasterers International Union of America; American Federation of Radio Artists; United Automobile Workers of America; Boot and Shoe Workers Union. Forty of these unions have submitted matters for arbitration in the first ten months of 1941. Of especial interest is the fact that in no case in which an arbitration took place has there been a refusal on the part of the employer or the union to abide by the terms of the award.

In one matter, recently submitted by a southern cotton mill and the Textile Workers Union of America, the arbitration will

concern the question of a work load, and is expected to create a formula that may be followed throughout the textile industry in the south. The arbitrator will be a person thoroughly experienced in work assignments and time studies in textile mills, and for the purpose of reaching a conclusion an engineer will be designated to make the necessary preliminary studies. A hearing will then be held, at which both parties will have an opportunity to examine and cross-examine the result of the report.

Another widespread coverage of a field by the Tribunal's facilities is that of radio. The recently announced inclusion of the Association's arbitration clause in a contract between a Miami radio station and the American Federation of Radio Artists brings to more than one hundred the total number of radio station contracts with the Federation in which this clause is incorporated.

For its work, the Association uses six clauses adapted to different steps to be taken under labor agreements. These clauses cover: general arbitration provision for the interpretation or application of the terms of the agreement to be inserted at the time the agreement is made; special arbitration provisions for the solution of questions or differences arising prior to or upon the expiration of a labor agreement; general provision for a combination of mediation and arbitration when mediation is an ancillary procedure; emergency provision for arbitration within specified time limits; provision for inquiry when questions of fact only are in issue; arbitration provision for determination of issues raised by changing economic conditions.

With the completion of the plan to throw open the Motion Picture Arbitration Tribunals in thirty key cities to the arbitration of industrial, as well as commercial, disputes,* the machinery of the Industrial Arbitration Tribunal and its opportunity to render assistance to defense industries takes on even greater importance.

* See announcement on page 304.

ARBITRATION LAW

ARBITRATION BONDS—AN OLD DEVICE RE-EXAMINED

FRANK D. PRAGER *

ARBITRATION is an extraordinary process, and the law pertaining to it is extraordinarily complex. One of the most astounding features is that, according to Common Law, a submission contract can be revoked. Arbitration bonds have been used to offset this legal anomaly, hence it is interesting to re-examine this legal device, its historical development and its possible functions under present-day conditions.

1. The Law at the Time of Lord Coke. A typical arbitration bond was involved in *Vynior's* case, decided by Lord Coke in the court of Common Pleas in 1609.[1]

Vynior claimed money from Wilde for work done. Wilde refused to pay. The parties agreed to submit the controversy to arbitration, appointing William Rugge as arbitrator. Wilde then executed an arbitration bond, presumably on Vynior's request. The bond was contained in an instrument separate from the submission contract. It was signed and sealed by Wilde and delivered to Vynior. The obligation of the bond was that Wilde should pay a certain sum of money to Vynior. The condition of the bond was that if Wilde would

> "stand to, abide, observe, perform, fulfill and keep the rule, order, judgment, arbitrament, sentence and final determination of William Rugge, Esq., arbitrator . . . . chosen . . . . to rule . . . . all matters . . . . depending between the said parties. . . . ."

then the obligation should be void, otherwise valid.

When Wilde noted that the arbitrator would hold against him he revoked his submission. Vynior then sued him in debt on the bond, and in due course made profert of the same. Defendant Wilde pleaded that the award or final determination as contemplated by the bond had not been made. Plaintiff Vynior replied

* Member of the Illinois Bar.

[1] Yearbook 7 Jac. 1. 2629; 8 Co. R. 80a; Brownlow and Goldesborough R. 64, 290; 3 English Ruling Cases 357.

that its lack was due to the defendant's revocation. Defendant Wilde demurred to this replication.

Lord Coke overruled the demurrer. His reasoning was, on the one hand, that defendant Wilde was entirely able to revoke the arbitrator's authority or power, since revocability was inherent in any power of attorney or the like and since even Wilde himself could not by his act or word make that irrevocable which is by its own nature revocable. However, Coke continued that the defendant's revocation, while legitimate, made him unconditionally liable on his bond,

> "and that for two reasons. First, because he has broken the words of the condition which are that he should stand to and abide, etc. the rule, order, etc. . . . . The other reason is because now the obligor has by his own act made the condition of the bond . . . . impossible to be performed."

Incidentally, Coke reports that when the parties submitted to arbitration, Vynior claimed only 22 pence of Wilde, but exacted a bond obligation as high as 20 pounds. The latter sum was the one that Vynior asked, and recovered, in Common Pleas. As far as the writer knows the relative values of penny and pound were the same then as now; the gold penny of Henry III, whose value approached that of the pound silver currency, was not in use in the times of Elizabeth and Coke.

Coke cited earlier cases [2] which more or less support his dictum that an arbitrator's power can be revoked. He also cited a few [3] of the several ancient cases passing on arbitration bonds,[4] using these to reenforce the holding that the party who revokes is liable on the bond. The whole dictum and holding can be traced to the *Civil Law* as codified by Justinian,[5] which provided for a penalty clause in a submission [6] and held concisely that "a defense cannot arise from submission but an action for a penalty imposed can." [7] That is, when a party claimant in ancient Rome

[2] Briefly reported by P. L. Sayre, 37 YALE L. J. 602 Note 25; criticized by J. H. Cohen, ARBITRATION AND THE LAW, 1918, p. 109-116.

[3] Yearbooks 5 Ed. 4. 3b; 18 Ed. 4. 18b; same, 20a; 21 Ed. 4. 55a. Contents reported by Cohen, *op. cit.* p. 53, 54, 89, 92, 106, 107.

[4] Cohen *op. cit.* p. 109, reports a pertinent case, Yearbook 49 Ed. 3. 8, 9, which has not been cited by Coke.

[5] KYD ON AWARDS, 1799, p. 8, 30, 34; Sayre, *loc. cit.* p. 597; H. Bentwich, 95 Law Times 524.

[6] L. 2 D. 4. 8.

[7] *Ex compromisso placet exceptionem non nasci sed poenae petitionem.* L. 2 D. 4. 8. A translation of the whole book 4 title 8 of Justinian's Digest,

revoked the submission of his claim and went to Court, the submission was no defense in the hands of the party respondent, against such Court action; but the bond of the party claimant was forfeited. Not only the claimant; also a respondent in arbitration proceedings could forfeit his bond by failing to appear before the arbitrator.[8]

2. Development of the Law after Coke. Coke was universally followed in the Common Law countries.

a. The dictum that a party has the inherent right to revoke his arbitrator's power was confirmed by actual holdings both in England[9] and America.[10] The great majority of cases are to this effect.[11]

One hundred and fifty years after Vynior's case[12] this rule was restated to the effect that private persons cannot *"oust the Court of jurisdiction."* This phrase was probably an old one at the time, but had not previously been applied to arbitration contracts. The phrase was one of those so cherished by some schools of so-called jurisprudence, which are easy to pronounce but hard to understand. It suggests that in a submission contract private persons attempt to interfere with rights or interests of the Courts, that is, of the public power or government. In fact, the only thing at stake is the right of private parties to enjoy the protection of the Courts. It would have been clearer to say that no private person can oust *himself* of the jurisdiction of the Court; and it would still be a question: when does a person oust himself, and when does he merely declare the legitimate and effectual waiver of a right that can be renounced?

It is impossible and unnecessary in a paper on arbitration bonds to discuss fully the history and present law of waiver of procedural rights; but we may briefly pause to consider a possible rationale of the rule as handed down by the Roman praetor and the interpreters of ancient Common Law, that a private

which title deals with arbitration, may be found in S. P. Scott, THE CIVIL LAW, Vol. 3 p. 116-133. Also see L. Wenger, INSTITUTES OF THE ROMAN LAW OF CIVIL PROCEDURE, 1940, p. 337, 338 and citations.

[8] LL. 29, 30, 37, also 13(3) D. 4. 8.

[9] E. S. Wolaver, 83 U. OF PA. L. R. 142.

[10] Cohen, *op. cit.* p. 128-141; Sayre, *loc. cit.* p. 598-600; N. Isaacs, 40 HARV. L. R. 932; Sturges, COMMERCIAL ARBITRATIONS AND AWARDS 1930, sec. 76; Restatement on Contracts, sec. 550; 15 L.R.A. 142; 47 L.R.A. (N.S.) 348.

[11] As to the minority rule, see footnote 16.

[12] *Kill* v. *Hollister*, 1 Wilson 129, King's Bench 1746; Cohen *op. cit.* p. 153.

declaration which contemplates arbitration instead of Court trial can have only partial effect. The argument from agency rules, as used by Coke, was a poor one; such rules cannot be so directly applied to a contract which is largely procedural in nature; and incidentally, the agency rule as used by Coke can be questioned. As long as a power coupled with an interest of the agent is irrevocable it is hard to see why an arbitrator's power, which obviously is a power coupled with an interest of a co-grantor, should be revocable. There is more substance to the "Ouster of Court" argument. The ancient law, both in Rome and in England, gave the parties almost absolute freedom in shaping their arbitration procedure. Both Common Law and early Equity disregarded most incidents of arbitral procedure. There is historical evidence that they disregarded, in arbitration matters, even such basic requirements as sufficient notice and a fair hearing of the parties.[13] At the same time they unquestionably felt the need of due process, and they held it almost self-evident that in the State Courts, with their jury trials, public hearings and other safeguards of justice, due process could be obtained. Thus they came to insist on open Courts for every one who had and preserved a controverted claim, not settled by judgment, compromise or award. As soon as there was an award made by properly authorized arbitrators the parties were bound for better or worse; but as long as there was only a submission and no award the parties could invoke the Court. The rule was simple but crude.

When the Courts of Equity established their power to censure Courts of Law they also sustained petitions to enjoin or cancel arbitral proceedings and awards;[14] and gradually, Equity came to feel that basic requirements such as a fair hearing before the arbitrators should be enforced.[15] Proceeding on this modified ground, Courts could no longer view themselves as sole dispensers of due process. As soon as Equity, and later statutes, enforced due process *within* the arbitral proceeding, the premises of that ancient policy vanished which had assumed that due

[13] *Tittenson* v. *Peat*, 3 Atkyns Chancery Reports 529, 1747; also see M. BACON ON AWARDS, 1770 p. 109 (with Common Law precedent), and *Denman* v. *Bayless*, 22 Ill. 300, 1859.

[14] Bacon, *op. cit.* p. 189.

[15] J. S. CALDWELL ON ARBITRATION, 1825, p. 51; Kyd *op. cit.* p. 95 (with Roman precedent).

process had to be enforced *in spite of* arbitral proceedings and agreements.

Therefore, Equity Courts, in later times, occasionally refused to follow the rule of law that submissions could be revoked.[16] However, the majority view in Equity followed the Law, in the absence of statutes abrogating the Law. They followed with grumblings. Lord Campbell went so far as to intimate that the early Common Law judges, in establishing the policy against ouster of jurisdiction, simply tried to protect their own judical power or income.[17]

As a result of the new rule that provided due process in arbitration as well as in Court, a few exceptions to the rule of revocability have come to be recognized, even in the modern Common Law. Those exceptions relate to referees, that is, arbitrators appointed in Court; [18] to one type of so-called appraisals or partial arbitrations,[19] and a few other fact-situations. The boundaries of such exceptions may be hard to draw,[20] but the principle is well settled—in the absence of a statute to the contrary you can revoke your arbitrator's power; you cannot oust yourself of the Courts.

b. We can now turn to the *subsequent history of Coke's decision*—that one who has signed an arbitration bond and who then revokes the arbitrator's power is unconditionally liable on the bond. We find that the law upheld this ruling also.

When the aforementioned formula of ouster of jurisdiction came into vogue and thus the public policy element of the rule of revocability was stressed, the Courts conceivably could have condemned arbitration bonds along with submission contracts.[21] Actually, however, bonds were not at that time, or for a hundred

[16] *Halfhide* v. *Fenning*, 2 Brown's Chancery Cases 336, 1788; Cohen *op. cit.* p. 156, 166 etc.

[17] *Scott* v. *Avery*, 25 L. J. (Exch.) 308, 313, 1855; Cohen *op. cit.* p. 253-264.

[18] 3 & 4 Wm. 4 ch. 42 sec. 39; *Rankin* v. *Rankin*, 36 Ill. 293, 1865; *Poppers* v. *Knight*, 69 Ill. App. 578, 1897.

[19] *Scott* v. *Avery, supra; Arnold* v. *Bournique*, 144 Ill. 132, 1893 and citations; *Wisconsin Bridge and Iron Co.* v. *Missouri-Illinois Bridge and Iron Co.*, 272 Ill. App. 12, 1933, etc.

[20] For instance, compare *Crilly* v. *Philip Rinn Co.*, 135 Ill. App. 198, 1907 with the Wisconsin Bridge case, above; also compare *Pacaud* v. *Waite*, 218 Ill. 138, 1905 with the Cocalis case as cited below.

[21] Sayre, *loc. cit.* p. 603, 604.

and fifty years thereafter, condemned on any such ground. They were enforced in full view of the public policy against ouster of Court by submission to arbitration.[22] The reason is that according to the cases [23] and considerations stated, an arbitrator's power and a submission contract are not illegal, immoral or void; they are only revocable and, therefore, ineffective as defenses in bar or abatement; [24] and provisions or bonds ancillary to a revocable contract may be given full force and effect if they are not themselves contrary to public policy.

Only in one respect have arbitration bonds been generally challenged subsequent to Vynior's case. Starting with the sixteenth century, *fines and penalties* were cut down by Courts of Equity and later by statutes. The fines, common recoveries, etc., disappeared from the field of real property actions in State Courts where they had been used in collusive suits; but they certainly did not disappear from the legal system altogether. It is true that in arbitration, Equity did away with a disproportionate recovery such as 20 pounds for 22 pence; but neither Equity nor statute abolished bonds in full. They only limited the recovery thereon to the "actual damages." [25] Accordingly, the arbitration textbooks of the eighteenth century suggest that the obligation of a good arbitration bond might run as high as the value of the thing submitted, or somewhat higher.[26] In other words the recovery on arbitration bonds was reduced from several thousand percent to about a hundred percent of the interest in controversy. To say that the Statute of Fines or any line of decisions made arbitration bonds ineffective or obsolete [27] is an overstatement. Those acts were only directed against gross abuses of bonds.

In isolated cases Courts or statutes have limited the recovery on arbitration bonds to some amount below the value of the thing

[22] See for instance *Warburton* v. *Storr*, 4 Barnewall and Cresswell 103, King's Bench 1825; also the other cases cited in Bacon, Kyd or Caldwell *op. cit.* and other early books on arbitration, such as J. March, 1674; John Wilson, 1793; and W. H. Watson, 1846.

[23] Vynior's case and *Kill* v. *Hollister, supra.*

[24] Sturges *op. cit.*, sec. 84; Restatement on Contracts, sec. 550; *Frink* v. *Ryan*, 3 Scam. 322, 1841.

[25] Sayre *loc. cit.* p. 604. Compare LL. 32, 52 D. 4. 8.

[26] For instance Bacon, *op. cit.* p. 5, 41. Compare 5 Holdsworth, Hist. Eng. L. 293.

[27] Cohen, *op. cit.* p. 150-152; Sayre *loc. cit.* p. 605.

submitted.[28] As long as the value of the thing submitted controls it is still necessary to ascertain that value, since a demand for a high sum is oftentimes made when the actual value of the claim is much smaller. The best rule is thought to be that which says that a claimant who has obtained an award must not recover on the bond beyond the award.[29]

When so regulated, arbitration bonds are a fair and efficient tool. Thus it can be understood why the arbitration books at the end of the eighteenth century taught that a submission by bond, as it is the most frequent, so it is by far the best,[30] and why submission by bond was a very ordinary mode of arbitration contract in the nineteenth century.[31]

When England by statute of 1889, made all submissions irrevocable except in cases of extreme bad faith, arbitration bonds ceased to serve a vital function in that country, and accordingly they are no longer an ordinary implement of English practice.[32] They have largely disappeared also in those American States which have an equivalent of the English act. However in some trades arbitration bonds are still remarkably active.[33]

3. Present Status of the Law. Much attention has recently been focused on submissions of *future controversies* and it is to them that we now have to direct our investigation. Parties will agree on arbitration, or on anything else, more readily when controversies are future and distant than when controversies are in full bloom. Therefore, a clause inserted in a sales contract, or in any other agreement, which provides for arbitration of future controversies arising out of the agreement, is by far the most important form of submission. Small wonder that it has not escaped criticism. The opinions discriminating against this form of submission go back to a somewhat questionable statement in the Corpus Juris of Rome,[34] which has been copied and

[28] Sturges, *op. cit.* sec. 3, 86, 302; *Union Ins. Co.* v. *Central Trust*, 157 N. Y. 633, 1899.

[29] *Low* v. *Nolte*, 16 Ill. 475, 1855 and 18 Ill. 437, 1857.

[30] Bacon, *op. cit.* p. 4, 5. Wilson, *op. cit.* p. 15.

[31] Watson, *op. cit.* p. 6; Russell, ARBITRATOR, 7th ed., 1891, p. 54.

[32] See the recent editions of Russell, *op. cit.*, for instance the 13th edition, 1935, p. 70.

[33] See, for instance, Westwood, 11 J. OF AIR LAW, 105, 1940.

[34] L. 46 D. 4. 8: An arbiter can make an award with reference to matters, accounts and disputes which in the beginning existed between the parties

restated often enough to be deeply engrained by this time. It is submitted that there is only one rationale which explains both this criticism and the rule of revocability as previously discussed: and that is that in the primitive law due process was not sufficiently enforced in arbitration, and it was thought enough to keep the State Courts open.

Undoubtedly submissions are revocable at Common Law. Clauses of future arbitration, however, have been held *void*, not merely revocable, by some American Courts. An early dictum of the Illinois Supreme Court [35] has more recently been restated as follows:

> "Arbitration . . . . was recognized at the Common Law. . . . . Specific performance . . . . would not be decreed . . . . and . . . . the authority of the arbitrators was subject to revocation. . . . . The statute . . . . now provides that a submission to arbitration shall . . . . be irrevocable. That provision does not violate any constitutional right. . . . .
>
> ". . . . If there is a submission to arbitration the law has always been that there must be an existing controversy between the parties. It is essential to the very idea of an arbitration. . . . (Citing and discussing a number of Illinois cases which relate to certain agreements on future disputes and treat such agreements as contracts for future appraisement or the like, recognizing them as such.) There is a clear distinction between an appraisement . . . . the purpose of which is not to adjudicate a controversy, and an arbitration of a controversy or difference between parties to be tried and decided. An existing legal cause of action is not necessary to authorize a submission and award, but there must be a dispute or honest difference of opinion concerning some subject in which both are interested (Citing an Indiana Appellate Court case). Even in a case where there is an executory contract an agreement that any dispute that may arise under it shall be submitted to arbitration, by which the individual citizen renounces his right to resort to the Courts provided by the Constitution for the redress of grievances and the settlement of disputes, is void." [36]

In this case the parties Cocalis and Nazlides, as members of a trade organization, signed identical but separate writings providing that each agreed with every other member that if controversies should arise out of some contract or dealings the same should be submitted to arbitration in designated manner, and that any party to such a controversy refusing to submit the same

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who submitted their affairs to arbitration, but not with reference to matters which took place subsequently.

[35] *Niagara Fire Ins. Co.* v. *Bishop*, 154 Ill. 9, 16, 1894.

[36] *Cocalis* v. *Nazlides*, 308 Ill. 152, 1923.

to arbitration should be held to have broken the contract contained in the writing, and should pay $25.00 stipulated damages. The said writings were deposited with the organization, apparently in trust for each member. Controversies did arise between the parties and submission was requested by Cocalis but refused by Nazlides. Cocalis sued Nazlides for the stipulated damages of $25.00, and recovered in the Trial Court. Nazlides carried this $25.00 issue to the Supreme Court of Illinois, on the constitutional question whether the statute could make submissions of future controversies irrevocable. The Supreme Court reversed the lower Court, in an opinion by Justice Cartwright, containing the above quoted statements, over the dissent of Justice Farmer.

Only a small part of this statement is directly responsive to the constitutional issue before the Court; this terminates with the pronouncement that the statute, in making submissions of any kind irrevocable, "does not violate any constitutional right." This summary treatment is quite surprising. Of course it had been recognized prior to the Cocalis case that arbitration of existing controversies is not a denial of due process, and that the law authorizing such arbitration confers no judicial power on the arbitrators and takes none away from the Courts.[37] However, the question of waiver of jury prior to formation of an issue, under State and Federal constitutions, was not so well settled; there was and still is much conflict of opinion both on the history [38] and present-day function [39] of juries. For this reason it is believed that the constitutionality of a statute making submissions irrevocable is not quite so self-evident as the Court seemed to assume; especially not as applied to submissions of future controversies. However the result reached in the Cocalis case is believed to be correct as far as the constitutional question is concerned; or should this partial result be incorrect this would not affect our arbitration bonds very much, since the ultimate conclusion could only be that upon failure of the statute, the Common Law governs, and the Common Law recognized the bond as irrevocable where it held the submission revocable.

[37] *White Eagle Ldry.* v. *Slawek*, 296 Ill. 240, 1921.

[38] Compare *People* v. *Scornavache*, 347 Ill. 403, 1931 with *Patton* v. *U. S.*, 281 U. S. 276, 1930.

[39] Compare the various theories about administrative bodies, and related topics. The lack of a Common Law jury is one of the features that contractural arbitrations have in common with the so-called arbitration before administrative boards, and with equity procedure.

The rest of the opinion deals with the construction and validity of submissions, no longer with the issue of construction and validity of the statute on submissions, or the possible effects of invalidity or part invalidity of the statute. As to the validity of submissions the opinion refers to what allegedly "the law has always been"; but it cites no authority for any settled law of invalidity of future submissions, except an Indiana Appellate case which incidentally does not support the contention. The opinion labors the point that as often as contracts for future determination have been upheld in Illinois they have been construed as contracts for future appraisements or for future determination of some point in a voluntary association, not as real submissions. The opinion fails to point out why appraisements should differ from controversies to be tried, as to revocability of the contract submitting them to arbitration or private determination. It also fails to point out in what the association of which Cocalis and Nazlides were members differed from other associations in which the submission of future disputes was recognized.

Obviously the Court wanted to hold against the plaintiff Cocalis, but was unable to follow Nazlides in his contention that the Statute could not constitutionally make submissions of future controversies irrevocable. The Court elected to strike down submissions of future controversies as such, by reference to "the very idea of an arbitration," a rather vague thing. The desired result, in favor of defendant Nazlides, could have been reached by the very simple observation that the so-called agreement on which Cocalis relied in this case was entirely uncertain as to contents since it related to controversies with an unlimited number of members, about an unlimited scope of matters; and mainly that the agreement was lacking in privity of contract between the parties. Indeed there is language in the last part of the Supreme Court opinion which seems to recognize those defects.

Those defects predicated on basic rules of contract law were the only legitimate grounds for the decision in the Cocalis case, and the statement on arbitration, which has been quoted, was merely a judicial dictum. It was very ill-considered. The Common Law as applied for several centuries preceding the Cocalis case did *not* require an existing controversy to support a valid submission. It did *not* so discriminate between submissions of existing and future controversies,[40] and the latter were well

[40] See Sturges, *op. cit.* sec. 76; Sayre, *loc. cit.* p. 604; J. T. Morse, ARBITRATION, 1872, p. 96.

known and *not* held repugnant to the "idea of arbitration." [41] Both types of submission were revocable; neither was void. Some appraisement contracts were not even revocable, after the middle of the nineteenth century.[42]

Thus it is proper for Courts in Illinois in spite of the Cocalis case to declare a submission of future disputes revocable [43] and not void; the dictum of the Cocalis case according to which they are void is based on error.

Only a statute could have made such a future submission void after the Common Law had declared it valid and only revocable; and there is no such statute in Illinois. It is true that the present Illinois Arbitration Act [44] as well as its predecessors,[45] initially states that parties may submit to arbitrators any controversy *existing* between them; but while the statute fails expressly to authorize other submissions, it has been settled at all times that Common Law submissions are not invalidated by the Illinois act, in the absence of any invalidating clause or implication.[46] Thus a submission may fail to comply with the various requirements of the act, such as written form, existing controversy, and others; and the submission may yet be valid according to Common Law.

Section 3 of the present Illinois arbitration act says that a submission shall be *irrevocable.* The section does not in terms refer to statutory submissions only; it reads as though it were intended to make all submissions irrevocable. Of course this section abrogates the Common Law of Vynior's case, as far as Lord Coke's dictum goes; and an abrogating statute, when ambiguous and subject to construction, must be strictly construed. Thus, if section 3 is held ambiguous it may be said the section fails to cover Common Law submissions, it relates only to statutory submissions; and Common Law submissions are still revocable. This line of thought is debatable; but it is clearly wrong to assume that the statute, in spite of its wording, made that *void* which previously, according to Common Law, had been revocable.[47]

[41] See for instance *Kill* v. *Hollister, supra.*

[42] See *Scott* v. *Avery, supra.*

[43] *McKenna* v. *Blatchford,* 304 Ill. App. 114 to 117, 1940.

[44] Smith-Hurd RS Ch. 10.

[45] Laws 1819 p. 71; RL 1827 p. 64; RL 1833 p. 78; RS 1845 p. 56; Laws 1873 p. 35.

[46] *Vanlandingham* v. *Lowery,* 1 Scam. 240, 1835. *Brown* v. *Atwood,* 224 Ill. App. 77, 1922; many other cases.

[47] See *Park Constr. Co.* v. *Indep. School Distr.,* 296 No. W. 475 (Minn.), 1941.

Accordingly it is submitted that in spite of sweeping dicta in the Cocalis case, Common Law submissions, including those of future controversies, can still be effectively secured by arbitration bonds, in Illinois and many other States which cling to the revocability rule. The bond of course must not be so vague and basically poor as the stipulated damages clause in the Cocalis case. It should be carefully drafted, as directed by precedent.[48] It should then be effective to overcome the antiquated revocability rule, and to strengthen a submission or award in other respects.[49]

[48] In Illinois, the following cases are in point: *Mann* v. *Richardson*, 66 Ill. 481, 1873: Capacity to sign arbitration bond coincides with capacity to submit. *Hamilton* v. *Hamilton*, 27 Ill. 158, 1862: Strict rule as to seal on a submission integral with a bond (obsolete). *Leitch* v. *Beaty*, 23 Ill. 642, 1860: Broad construction of arbitration bond in light of broad submission. *Burt* v. *McFadden*, 58 Ill. 479, 1871: Narrow construction of arbitration bond in light of narrow submission. *Frink* v. *Ryan*, 3 Scam. 322, 1841, *Ross* v. *Nesbit*, 2 Gilm. 252, 1845, *Paulsen* v. *Manske*, 126 Ill. 72, 80, 1888, *Pickrel* v. *Doubet*, 239 Ill. App. 553, 556, 1926, *McKenna* v. *Blatchford*, 304 Ill. App. 101, 114-117, 1940: Restatements of the dictum in Vynior's case. *Cole* v. *Chapman*, 2 Scam. 34, 1839, *Frink* v. *Ryan*, 3 Scam. 322, 1841, *Chadsey* v. *Brooks*, 2 Gilm. 378, 1845, *Kanouse* v. *Kanouse*, 36 Ill. 439, 1865, *Noyes* v. *McLaflin*, 62 Ill. 474, 1872, *Stearns* v. *Cope*, 109 Ill. 340, 1884: Restatements of the rule in Vynior's case. *Low* v. *Nolte*, 16 Ill. 475, 1855, *Brown* v. *Atwood*, 224 Ill. App. 77, 1922: Recovery on an award is possible without regard to a collateral arbitration bond the obligation of which is less than the amount of the award. *Low* v. *Nolte*, 18 Ill. 437, 1857: Recovery on an arbitration bond must not exceed the amount awarded, plus costs, even if the obligation of the bond exceeds the award (Also see, *Noyes* v. *McLaflin*, 62 Ill. 474, 1872 and *Stearns* v. *Cope*, 109 Ill. 340, 1884; but compare *Chadsey* v. *Brooks*, 2 Gilm. 378, 1845 and *Kanouse* v. *Kanouse*, 36 Ill. 439, 1865.) *Burt* v. *McFadden*, 58 Ill. 479, 1871, *Stearns* v. *Cope*, 109 Ill. 340, 1884, and *Howett* v. *Monical*, 25 Ill. 122, 1860: Rights and Duties of Sureties on arbitration bonds. *Phelps* v. *Dolan*, 75 Ill. 90, 1874 and *Lockett* v. *Thorne*, 221, Ill. App. 621, 1921: Informal deposit collateral to submission, enforced. *Brown* v. *Atwood*, 200 Ill. App. 210, 1916: Judgment clause collateral to submission, declared invalid.

[49] See mainly *Cole* v. *Chapman*, 2 Scam. 34, 1839 and *Stearns* v. *Cope*, 109 Ill. 340, 1884. Of course a party cannot enforce his arbitration bond where the arbitration or award is defective due to acts chargeable to himself, *Catlett* v. *Dougherty*, 114 Ill. 568, 1885; but a party can, according to the Vynior, Cole and Stearns cases enforce his arbitration bond over most or all other defects in the submission, arbitration or award.

REVIEW OF COURT DECISIONS

WALTER J. DERENBERG

NEW YORK COURT OF APPEALS

Husband and Wife—Limitation of Statutory Arbitrations to Controversies Which May Be the Subject of an Action. Appeal from a judgment of the Appellate Division modifying a judgment of Special Term confirming an award.[1] Appellant and respondent are husband and wife. They separated in December, 1939. Desiring to reach an agreement as to (1) "the amount of the allowance to be made by the husband for the support of the wife" and (2) "the amount of the allowance to be made by the husband for the support of a daughter," then seventeen years of age, the parties, by a written stipulation, submitted these matters to an arbitrator, who took testimony and made an award fixing the amounts to be paid by the husband. Upon a motion by the respondent wife this award was confirmed by Special Term and judgment was entered accordingly.

In reversing the decision of the lower court, the Court of Appeals held that the subject of the arbitration was the amount of support due the wife and that such matters could not be made the subject of an action. The Court said:

> "Respondent would have us construe the written submission as a contract to provide support. Such a construction seems unwarranted. The submission amounted simply to an agreement that an arbitrator measure and fix the amount that a husband should pay for the support of his wife and daughter, without reference to the causes of the separation, or fault, or the right of either to a separation decree against the other."[2] . . . .

Edna W. Stern v. *Walter T. Stern*, 285 N. Y. 239, 33 N. E. (2d) 689 (1941).

Unacknowledged Statutory Award Not Enforceable By Common Law Action Where Agreement Provided Expressly for Statutory Arbitration. Plaintiff operates a steam laundry in Westchester County. In February, 1938, the Inter-Borough Laundry Board of Trade, Inc., together with the plaintiff and other members, signed a contract with United Laundry Workers' Union whereby the employers recognized this Union "as the exclusive bargaining agent for all of its employees" and agreed "to employ none but members

[1] The decision of the Appellate Division in this case was reported in Vol. 5, ARBITRATION JOURNAL, p. 103, 1941.

[2] It should be noted that this decision of the Court of Appeals was handed down before the recent amendment to Section 1448 Civil Practice Act became effective. Under this amendment questions arising out of valuations, appraisals or other controversies, which may be collateral or incidental, may be included in a submission to arbitration. This amendment, in effect, overrules the Court of Appeals' decision in *Matter of Fletcher*, 237 N. Y. 440, on which the Court relies in the present case.

in good standing of the Union." It was provided also that the agreement be automatically renewed from year to year unless terminated by written notice sixty days prior to its expiration. The contract provided for submission of all disputes to arbitration.

In August, 1939, a dispute arose and an arbitrator was appointed by the Supreme Court in accordance with Section 1452, C. P. A., and an award requiring employer to reinstate certain employees was signed and published on October 27, 1939. The award, however, was not acknowledged. After the hearing plaintiff gave notice to the Union that it intended to terminate the contract and the contract was actually terminated four days after the award was published. The arbitrator refused to acknowledge the award when informed that the employer was no longer under any contractual obligation to maintain a union shop. The Union made a motion to send the proceedings back to the arbitrator on the ground that the award was the result of a mistake and did not accord with his real intention, while the employer made a counter-motion to compel the arbitrator to acknowledge the award as published. Special Term denied both motions and its decision was affirmed by the Appellate Division without opinion. No appeal from this decision was taken and it marked the end of statutory proceedings to enforce the award.

The plaintiff then brought the present action for judgment based on the award and for damages resulting from a strike in violation of the contract. Special Term granted summary judgment and its decision was affirmed by a divided court in the Appellate Division. From the latter decision the defendant appealed. *Held*, judgment reversed.

> "The Civil Practice Act, embodying the provisions of the Arbitration Law, provides a convenient method to enforce an award by motion, but a party to an arbitration may if he chooses, elect to pursue the other party by an action for a judgment based upon the award."

The New York Court will enforce an award made pursuant to submission or contract "made otherwise than as prescribed" in the statute, provided the plaintiff can show that the award has in fact been made in accordance with the terms and conditions of the submission or contract.

Under the language of Section 1469 of the New York law, an award not enforceable by statutory methods is enforceable by action unless the agreement clearly indicates that the parties intended to arbitrate under the statute. Here the contract provided that "the award of the Impartial Chairman shall be rendered in writing and as prescribed by the Arbitration Law of the State of New York." The contract also provided that any party in whose favor an order was made could thereupon:

> ". . . . *apply to the Supreme Court of the State of New York for the confirmation of such award, direction, prohibition or order and for the enforcement thereof with the same force and effect and in the same manner and pursuant to the same proceedings and construction thereof as if such award, direction, prohibition or order were made in an arbitration proceeding pursuant to the Arbitration Laws of the State of New York.*" (Italics the courts.)

In view of this unambiguous language, it must be held that the parties agreed on a statutory arbitration enforceable only by statutory method. Therefore the award in this case cannot be enforced by action. *Sandford Laundry, Inc.* v. *Simon et al.*, 285 N. Y. 488, 35 N. E. (2d) 182 (1941).

NEW YORK SUPREME COURT—APPELLATE DIVISION

Industrial Arbitration—Scope of Arbitration Agreement. Appeal from an order confirming an arbitration award. The submission contained the question: "Did justification exist for the discharge of A. S. and, if not, shall he be reinstated?"

The agreement itself was entitled "In the Matter of the Arbitration between D. L. Horowitz, Inc., and International Brotherhood of Teamsters, Local No. 27," and was signed by the treasurer of Horowitz, Inc., and a representative of the union. S. did not sign the agreement but appeared as a witness before the arbitrator. The arbitrator handed down an award stating that: "Justification existed for the discharge of S." The award was again entitled: "In the Matter of the Arbitration between D. L. Horowitz, Inc., and the International Brotherhood of Teamsters, Local 27." The motion papers on the motion to confirm, however, were entitled: "In the Matter of an Arbitration of and concerning matters in difference between S., of the one part and D. L. Horowitz, Inc., of the other part." It was alleged in support of the motion that the representative of the union in signing the submission had acted as S.'s agent. S., on the other hand, claimed that the subject of the controversy was his alleged rights as a member of the union, rather than his contractual rights against Horowitz, Inc., and denied that the union's agent was authorized to act on his behalf. *Held*, order confirming the award reversed.

> "In view of the form of the written submission of the controversy, and the dispute that exists as to whether the subject matter of the arbitration was a labor dispute or S.'s contract rights, we deem that it was improper to enter judgment against S.
>
> "The order should be reversed and an order entered in place thereof entitled in the same manner as the submission of controversy. The order should recite all the proceedings had and direct that the award be confirmed and that D. L. Horowitz, Inc., have judgment against Local 27 of the International Brotherhood of Teamsters accordingly. With the order in this form the question as to how far the rights of S. were adjudicated by the arbitration proceeding will be left open for trial in the action which S. has since brought for breach of contract."

In the Matter of Steinberg and Horowitz, N. Y. Sup. Ct., App. Div., First Dept., N. Y. L. J., July 3, 1941, p. 27.

NEW YORK SUPREME COURT—SPECIAL TERM

Reversal of Arbitrator's Award for Error of Law. Motion to confirm an award. The parties had made a contract governing the relations between the union and its members and the corporation. The corporation's place of business was in effect destroyed by fire and the business came to an end. The

employees were not thereafter paid and claimed that they were entitled to continued payment. Under the contract such matter was to be arbitrated. The arbitrator decided in favor of the employees. This motion is to confirm the award. *Held*, motion denied.

> "It seems to be the meaning of the contract that the arbitrator shall decide, not as a court would decide, namely, on the law alone, but decide what in justice and fairness and equity and good conscience should be done for the employees during the period that the fire prevented doing business.
>
> "It is quite evident from the papers that the referee did not proceed in this direction. His approach was that of a lawyer looking at the legal meaning of the contract, which in that direction had no meaning. Where an arbitrator who is to decide, not on the law alone, but on the whole situation, proceeds to decide this kind of question on the law, and it is apparent that his conclusion as to the legal meaning of the contract is not in accord with the court's opinion of the law, the court has the power to judge the award from the standpoint of the law (*Fudicar* v. *Guardian*, 62 N. Y., 392).
>
> "The court, therefore, being free to apply the law of this state to this contract and it appearing in the contract that no such emergency as this is provided for, concludes that the contract gives no right of claim or action to these who in the meantime, pending the resumption of business, are out of employment. . . . ."

In re Reid & Yeomans, Inc. (*Drug Store Employees' Union, &c.*), N. Y. Sup. Ct., Spec. Term, Pt. I, July 24, 1941, N. Y. L. J., p. 188, Johnson, J.

Should Award Violating the New York Usury Law be Confirmed and Judgment Entered Thereon? Motion to open default on a motion to confirm an award. Both the respondent and the petitioner were members of the New York Stock Exchange. The Arbitration Committee of the Exchange rendered an award against respondent in the sum of $50,000, plus interest and costs. A motion to confirm the award was made at Special Term and granted upon default by the respondent. Judgment was entered in favor of petitioner on June 14, 1940. Respondent now moves to open up the default on the ground that previous objection on his part to the award would have subjected him to disciplinary action by the governing authorities of the Stock Exchange and probably even to expulsion from the Exchange. *Held*, motion to open the default granted.

> "In my opinion, there is merit in the respondent's explanation of his failure to oppose the motion to confirm the award, reinforced as it is by the averment of an attaché of the Exchange."

The court then proceeded to examine respondent's allegation that the arbitrators' award was void for usury and held that the award in the present case was rendered in violation of the Usury Law and therefore not enforceable by statutory method. Citing the general rule that arbitrators

are not required to follow strictly the rules of law or evidence in arriving at their determination, the court said:

> "It is well established that void obligations cannot be given legal vitality by the arbitration process. Through the enactment of its usury laws, our state has declared its public policy to be against the enforcement of a usurious contract. Where public policy is so expressed, arbitrators can neither ignore, nor by an award, nullify that public policy."

Matter of Gale, Sup. Ct., Spec. Term., Part I, N. Y. L. J., April 19, 1941, p. 1745, Pecora, J.[1]

Arbitration Clause not Enforceable in a Foreign Country Where Both Parties Are Residents of New York. Motion for a stay of a civil action. Petitioner alleged that the issues involved in the action should be arbitrated in accordance with the terms of a contract entered into between the parties in Zurich, Switzerland, which provided for arbitration there in accordance with the laws of Switzerland. *Held*, motion denied. The parties were residents of Europe when the contract was made but both are now residents of New York. Even if the contract were sufficiently broad to be construed as an arbitration agreement and not as contrary to public policy, the present motion should be denied. It appears that on a prior occasion the respondent, in accordance with the terms of the agreement, had submitted to the foreign tribunal for arbitration but had refused to pay his share of the costs.

> "It is quite apparent from a reading of the moving papers that the application is not made in good faith. In the exercise of discretion the motion should for that reason be denied (*cf. Uhrig* v. *Ins. Co.*, 101 N. Y. 362, 365-366). I am convinced that, even if the matter were submitted to arbitration the petitioner would default. And I am also satisfied that if the decision were against him the petitioner would not abide by it. The petitioner is merely trifling with the processes of our courts. This should not be countenanced."

Berenson v. *Rubinstein*, Sup. Ct., Spec. Term, Part I, N. Y. L. J., May 8, 1941, p. 2062, Benvenga, J.

What Constitutes a Substantial Triable Issue Raised on Motion to Compel Arbitration? Motion to compel arbitration. A partnership agreement which petitioner claims to be still "in full force and effect" contained an arbitration provision. Respondent in his answer denied the alleged partnership agreement was still in force and effect and alleged that it had been cancelled and abandoned by mutual agreement. *Held*, motion denied without prejudice to renewing it upon presentation of evidentiary facts sufficient to determine at least that a *bona fide* dispute exists. The petitioner makes a general

[1] Upon appeal from decision of Pecora, J., here reported, the Appellate Division recently reversed Special Term's dicision on the ground that the motion to open the default should have been denied. *In re Gale*, 28 N. Y. S. (2d) 270 (1941).

denial of the respondent's allegations, but sets forth no evidentiary facts to sustain his contention that the partnership agreement is still in full force and effect, asserting that he may reserve his right to do so on the trial of said issue.

> "The procedural question is therefore raised whether the applicant is entitled as a matter of law to a jury trial when the issue of the existence of a contract to arbitrate is raised merely by a conclusory allegation which is not substantiated by supporting facts, as contrasted with the evidentiary matter set forth by the respondent. The petitioner contends that the issue of enforcibility is sufficiently raised by the naked denial of the respondent's statement and proof of evidentiary facts.
>
> "The specific question herein involved is a novel one. However, it seems to me that an examination of the applicable statute (C. P. A., Sec. 1450, as amended) would require the presentation of *evidentiary facts* on the part of the petitioner as well as on the part of the respondent in order to raise a substantial triable issue. Such facts may aid the court in determining whether or not a bona fide dispute exists, in which event the issue may then be tried before the court, or in a proper case, before the court and a jury."

Matter of Bernstein (Abrams), Sup. Ct., Spec. Term, Part I, N. Y. L. J., April 22, 1941, p. 1788, Smith, J.

Court Appointment of Arbitrator Where Sole Arbitrator Named by Parties Refused to Act. Motion for the appointment of an arbitrator. The parties had entered into a written agreement in which a sole arbitrator was named, who thereafter refused to act. *Held*, motion granted.

> "I am of the opinion that the refusal of the arbitrator named in the said agreement to serve should not vitiate the arbitration provision therein. Section 1452 of the Civil Practice Act unequivocally provides that the court may appoint an arbitrator 'who shall act under the said contract or submission with the same force and effect as if he or they had been specifically named therein.' This section further provides that where a method of appointment is provided and 'any party thereto shall fail to avail himself of such method, or for any reason there shall be a lapse in the naming of an arbitrator . . . . , or in filling a vacancy, then, upon the application of either party to the controversy, the Supreme Court, or a Judge thereof, shall designate and appoint an arbitrator. . . . .' The language of this section is sufficiently broad so as to permit the appointment by the court of an arbitrator where, as here, the one designated refused to serve."

In re Solomon, et al., Sup. Ct., Spec. Term. Part I, N. Y. L. J., August 2, 1941, p. 260, Kadien, J.

Validation of Unacknowledged Oral Award by Subsequent Acknowledgment. Motion to confirm award and cross-motion to vacate. It was alleged by the cross-movant that the unanimous decision of the arbitrators on November 27, 1940, became the final and binding award although it was not in writing

or acknowledged as required by the rules. *Held*, motion to confirm granted and cross-motion denied. The oral award was properly characterized as "tentative." It could not be final unless it was in written, acknowledged form. The fact that the award of December 10 was acknowledged separately and not at the same time before the Notary Public, was a mere irregularity capable of being corrected within the purview of Section 1462-a of the Civil Practice Act.

> "While claim is made that the arbitrators became functus officio upon their signing the award on December 10, 1940, they did in fact re-acknowledge their prior signatures and award at a later date together, at the same time, before the very notary public before whom the prior acknowledgment was taken. Moreover, when the depositions of the arbitrators were taken before an official referee at the request of the losing party for use upon this motion, they again reaffirmed their award and acknowledgment."

Matter of Knickerbocker Textile Corp'n. (*Sheila-Lynn, Inc.*) Sup. Ct., Spec. Term, Part I, N. Y. L. J., July 9, 1941, p. 72, Rosenman, J.

Stay of Civil Action in Violation of Provision for Arbitration in Foreign Jurisdiction. Motion for a stay of civil action. *Held*, granted.

> "While the court will not compel a party to resort to arbitration in a foreign jurisdiction, it will stay his action until such arbitration has been had (*Matter of Inter-Ocean Food Products, Inc.*, 206 A. D. 426)."

Richardson v. *Holland-Colombo Trading Soc., Ltd.*, Sup. Ct., Spec. Term, Part I, N. Y. L. J., June 26, 1941, p. 2861, Dineen, J.

Arbitration Clause Unenforceable Against Receiver. Motion to compel arbitration against a receiver. *Held*, denied.

> "The receiver is not a party to the arbitration agreement and cannot be compelled by the other party thereto to act under it (*In re Lowenthal*, 199 A. D., 39, aff'd 233 N. Y. 621). The receiver has brought an action in which all the other parties are defendants. Their respective rights can be decided in that litigation."

Newburger v. *Myers*, Sup. Ct., Spec. Term, Part I, N. Y. L. J., May 10, 1941, p. 2105, Cohalan, J.

Declaration of Treasurer Does Not Constitute an Arbitration Award. Stockholders' representative action. The by-laws of the corporation in question provided as follows:

> "The declaration of the Treasurer as to the amount of net profits for the year and the sum due anyone hereunder shall be binding and conclusive on all parties, and no one claiming hereunder shall have the right to question the said declaration, or to any examination of the books or accounts of the Company, and nothing herein contained shall

given any incumbent of any office any right to claim to continue therein, or any other right except as herein specifically expressed."

The question is now presented, *inter alia*, whether the decision of the treasurer under this provision has the force and effect of an arbitration award or whether it may be reviewed on the merits by the Court. *Held*, the above provision does not make the treasurer an arbitrator.

> "This provision does not make the treasurer an arbitrator in the strict sense of the term. Rather, it is in the nature of a contract whereby a designated person is selected merely to make a determination 'to avoid a possible controversy'; he does not act as a judge in a quasi-judicial manner settling 'a controversy between the parties.'"

Heller, et al., v. *Boylan, et al.*, N. Y. Sup. Ct., Spec. Term, Pt. IV, N. Y. L. J., May 28, 1941, p. 2399, Collins J.

Issue of Validity of Contract May Not Be Raised After Participation in Arbitration. Motion to confirm an award. The respondents had participated in the arbitration proceeding without making any claim that there was no valid contract or submission. This allegation was made for the first time on the motion to confirm an award. *Held*, motion granted. No one may participate in an arbitration proceeding and then attempt to escape the consequences of a voluntary submission to jurisdiction.

> "*Shafran & Finkel, Inc.*, v. *Lowenstein* (280 N. Y., 164) has no application to the instant case. There an attempt was made to bind parties to an arbitration award by the simple device of service of a notice on them to arbitrate at a time when they claimed there was no arbitration contract."

Nelson v. *Bestform Knitwear Corp.*, Sup. Ct., Spec. Term, Part I, N. Y. L. J., July 23, 1941, p. 177, Hofstadter, J.

SUPREME COURT OF LOUISIANA

Effect of Stipulation Applying Strict Rules of Evidence in Arbitration Proceeding. Appeal from a judgment confirming an award. The contract between the parties contained an arbitration clause which provided: "The procedure and rules of evidence applicable to proceedings in the courts of the State of Louisiana shall apply to the proceedings of arbitration."

Appellant filed twenty-six objections to the rulings and findings of the arbitrators based on alleged violations of the technical rules of evidence as applicable in the State of Louisiana. The lower court overruled these objections and confirmed the award. *Held*, judgment affirmed.

> "If the procedure to be followed before the arbitrators is prescribed, necessarily it must be carried out in compliance with the statutory provisions. On the other hand, if the procedure is not specified there would seem to be no good reason why it may not be covered by the agreement of the parties. Where neither statute nor the agreement prescribes the rules of procedure, the proceeding is governed by the

ordinary rules of practice and procedure obtaining in the place where the arbitration is held.

"The primary purpose of the Louisiana arbitration statute is to enforce agreements to arbitrate and the awards of the arbitrators. In furtherance of its purpose, the statute prescribes certain regulations that apply generally to all arbitrations. Among these regulations is one conferring upon the arbitrators the authority to summon and compel the attendance of witnesses and to direct the taking of depositions to be used in evidence before them. But there is nothing in the statute which forbids the parties to agree that the rules of evidence obtaining in the courts of the state shall apply to the proceedings before the arbitrators. In the absence of any such statutory restriction, we are constrained to hold that the stipulation in the arbitration agreement relative to the procedure and rules of evidence to be applied in the arbitration proceedings is valid and enforceable."

The Court then concluded that even if the strict rules of evidence were applied in this case, the arbitrators had not violated such rules. *Housing Authority* v. *Henry Ericsson Co.*, 2 So. (2d) 195 (1941).

SUPREME COURT OF WASHINGTON

Failure of Fact Finders to Observe Strictly Time Limit Set by Agreement Does Not Invalidate Appraisal. Actions to recover amounts of wages due the plaintiffs under an award of fact-finding appraisers. Appeal from a judgment for defendants. These actions were brought by fishermen in Alaska against three salmon packers in one of the recognized fishing districts in Alaska. The plaintiffs were all members of a fishermen's union and had been in the employ of the respondents during the fishing season of 1937. The salmon packers of Alaska had formed an informal association known as the "Canned Salmon Industry," whose principal object it was to bargain collectively with labor. When no collective agreement could be reached with regard to the wages to be paid the various union members, it was agreed to submit this question to a fact-finding board to determine whether or not certain decreases in compensation were justified. It was agreed, *inter alia*, that the findings of fact and the report of the majority of the Board should be binding and conclusive and should be in writing and filed with the Federal Conciliator and each of the signing unions prior to August 25, 1938. The final written award for the district here involved was signed on August 26, or the next day, the result having been announced to the Federal Conciliator on August 25.

The present actions were instituted for the purpose of recovering judgment for the difference between the minimum prices fixed in the agreement and the amount fixed by the award. It was alleged in the answer that the award of the fact-finding board was not binding because it was filed too late and had not been reduced to writing and signed until two days after the expiration of the time limit fixed in the agreement. *Held*, judgment of the lower court reversed. The time limitation was not of the essence of the contract and not a basic or substantial part of the preparation and filing of the report. The members of the fact-finding board served as appraisers

rather than as arbitrators and the failure of appraisers to observe the time limit should not be considered a direct breach of the contract, to which the appraisers themselves were not parties.

> "A sound and well recognized public policy strongly supports arbitration of disputes between employers and employees.
>
> "Upon no theory can it be contended that, within reasonable limits, the time element, in so far as the filing of the report was concerned, was of the least consequence. The parties did not contract that time was of the essence of the agreement, and apparently the report was very generally accepted and acted upon by those concerned."

Hegeberg, et al. v. *New England Fish Co.; Same* v. *Pioneer Canneries, Inc.; Same* v. *Pioneer Sea Foods Co.*, Supreme Court of Washington, 110 Pac. (2d) 182 (1941).

UNITED STATES CIRCUIT COURT OF APPEALS—FIFTH CIRCUIT

Determination of Fair Rental Value Constitutes Arbitration Award and Not Appraisal—When Arbitrators Become *Functus Officio*. The lease provided that in the event no amount of rental could be agreed upon on renewal of the lease, arbitrators should be chosen to determine the fair rental value and the parties were to abide by the arbitrators' decision. Three arbitrators were appointed and handed down a decision without having given notice of and without ever having held a hearing. The landlord petitioned the arbitrators to set aside the award and grant a hearing upon the principal ground that it had no notice of hearing and had not waived such notice. The board of arbitration thereupon set aside the award, gave notice of hearing, heard the evidence, and returned a second and different award. The question before the Court was whether the first or the second award was valid. *Held*, both awards are invalid and a new arbitration in accordance with the still existing terms of the contract should be ordered.

> "We think it clear that the proceeding contemplated by the contract and undertaken pursuant to it was an arbitration rather than an appraisal. It was not agreed that the amount of rental should be fixed by disinterested third persons, which would have contemplated an appraisal; rather it was provided that the rent should be agreed upon between the parties, and only in the event of a genuine dispute between them as to the rental value of the premises would the matter be submitted to arbitrators. . . . . The chosen body acted in lieu of, and with its decision having the binding quality of a judgment of, a court of law. These are the functions of a board of arbiters, and the proceeding had was a common-law arbitration."

After pointing out that the first award was void because the parties had not been granted an opportunity to be heard, contrary to common law principles, the Court concluded that the second award was likewise invalid because the powers and duties of the arbitrators under the submission had terminated with the rendition of the first award.

> "Their authority is not a continuing one, and, after its final decision is announced, it is powerless to modify or revoke it or to make a new

award upon the same issues. The first award disposed of all questions before the arbiters, and was final; the publication of that decision exhausted the powers of those appointed even though the action was void, and the second award is no more valid than the first."

Citizens Building of West Palm Beach, Inc. v. *Western Union Tel. Co.*, C. C. A. V, 120 Fed. (2d) 982 (1941).

UNITED STATES CIRCUIT COURT OF APPEALS—FIRST CIRCUIT

Interpretation of Scope of Arbitration Agreement is for the Court and Not for the Arbitrator. Appeal from a judgment of the United States District Court of Puerto Rico for the plaintiff in the sum of $4,250, with interest. The action arose out of a written contract for the purchase and sale of rice entered into between the parties in September 1939. The form of contract used was the standard Puerto Rican contract of The Rice Millers' Association which provided, *inter alia*, that the certificate of the Rice Millers' Association with regard to quality, grade and conditions should be final. On the reverse side of the contract was an arbitration clause providing for arbitration of "all questions of quality, complaints, disputes and/or controversies that may arise out of or in connection with this contract." It was also provided that the buyer was to file a request for arbitration within five days after the goods had been discharged. It was further provided that:

> "Failure to request arbitration in the manner specified within five (5) business days after goods are discharged from ship, forfeits all right to complaint and goods shall be accepted and paid for at full invoice price."

The rules also provided for appeal at the option of the buyer if the arbitration board should grant an allowance over one-fifth of one cent per pound. The buyer in this case complained that the merchandise received was "Fancy Japan Rice" and "not 'Extra Fancy Japan' rice as had been ordered" and procured a certificate of the Rice Millers' Association to the effect that the rice shipped was an inferior grade. The seller thereupon demanded arbitration of the question of the difference in value between the rice ordered and that shipped, claiming that if the difference were one-fifth of one cent per pound or less, the buyer should agree to accept the merchandise at the allowance made. The buyer, on the other hand, refused to submit to arbitration and alleged that the certificate of the Rice Millers' Association was conclusive and that the contract did not require the buyer to submit the question of difference in value to arbitration and to accept an inferior grade of goods at an allowance when the shipment was accompanied by the Association's certificate. The buyer, therefore, alleged that there was nothing to arbitrate and objected in writing to the Arbitration Committee of the Chamber of Commerce of San Juan. The Committee, however, took jurisdiction and decided that the matter had to be arbitrated in accordance with the rules and regulations of the Chamber of Commerce. When the buyer refused to abide by this decision, the seller brought this

action for the full invoice price, for which he claimed the buyer was liable because of his failure to request arbitration within five days after the goods were discharged. *Held,* judgment of the lower court reversed and case remanded. It was not for the Arbitration Committee of the Chamber of Commerce but for the court to decide whether the difference here involved came within the scope of the arbitration agreement.

> "It is now well settled that the question of the construction of a contract to determine what questions the parties thereto agreed to submit to arbitration is one for the court to decide and not for the arbitrators. . . . . To allow the arbitrators conclusively to decide what questions were submitted to arbitration is to allow them finally to determine the extent of their own jurisdiction.

B. Fernandez & Hnos., S. En C., v. *Rickert Rice Mills, Inc. C. C. A. I,* 119 F. (2d) 809 (1941).

UNITED STATES CIRCUIT COURT OF APPEALS—NINTH CIRCUIT

Federal Courts Will Not Enforce Arbitration in District Other than One Where Petition is Filed. Proceeding in admiralty for an order compelling arbitration of certain differences growing out of a charterparty entered into between the parties. Appeal from an order directing arbitration within the district where the petition was filed. The arbitration agreement in the charterparty provided for arbitration in New York and it was alleged by the appellant that the order of the lower court should have provided for a hearing in New York rather than in the Portland district. *Held,* order affirmed. The statute expressly provides that the hearing and proceeding shall be within the district in which the petition for the order directing the arbitration is filed.[1]

With regard to appellant's allegation that the order of the lower court does not conform to the agreement of the parties for arbitration in New York, the Court said:

> "Prior to the enactment of the United States Arbitration Act (1925) such agreements could not be enforced in the courts of the United States. If there could be any doubt of the power of the legislature to limit the right of arbitration to one conducted within the jurisdiction of the district court ordering the arbitration, it must be dispelled by the consideration that Congress could attach any limitation it desired to the right to enforce arbitration in the federal courts, that it has made a condition that the arbitration be held in the district where the court sits, that the contract in question was executed with a knowledge that Congress

[1] Section 4 of the Federal Arbitration Act provides in part:

> ". . . . the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement: Provided, That the hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed."

had so provided, and that the appellant had invoked the jurisdiction of a court other than that having jurisdiction in New York to enforce the agreement. The appellant, having invoked the jurisdiction of the United States District Court for Oregon is hardly in a position to complain that it has exercised that jurisdiction in accordance with the statute giving it jurisdiction."

Continental Grain Co. v. *Dant & Russell, Inc.*, C. C. A. IX, 118 F (2d) 967 (1941).

UNITED STATES DISTRICT COURT

Effect of Repudiation of Principal Contract on Arbitration Clause. Application for a stay of proceedings pending arbitration. Petitioner instituted a libel in admiralty as charterer of a certain steamer against the vessel and her foreign owner for a breach of the charterparty signed in New York in October, 1940. The charterparty provided for a voyage from one safe port in the United States Gulf to two safe ports in Japan, and contained the following arbitration clause:

"Demurrage or despatch is to be settled at New York. Owners and Charterers agree in case of any dispute or claim to deposit in escrow the amounts involved until such dispute or claim is definitely settled later on between Owners and Charterers by arbitration in New York. Also in case of dispute of any other nature whatsoever same is to be settled by arbitration in New York and in both cases arbitrators are to be commercial men."

The owner demanded an irrevocable guarantee to be signed by the charterer against possible seizure or detention of the steamer, which the latter refused. The respondent then failed to deliver the steamship in accordance with the provisions of the charterparty and the present libel was filed. Respondent filed a motion for an order to stay the proceeding until arbitration had been had in accordance with the above-mentioned arbitration clause. *Held*, application for a stay of proceedings denied. The owner's action in asking for an irrevocable guarantee and upon its rejection refusing to deliver the steamer, constituted a repudiation and breach of the charterparty. The owner, because of such repudiation on his part, is not entitled "to insist on a subordinate term of that contract still being enforced." *Mitsubishi Shoji Kaisha, Ltd.*, v. *Nicolaous et al.*, U. S. D. C., E. D. La., 38 F. Supp. 156 (1941).

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